

①
No. 88-6222-CSY
Status: GRANTED
CAPITAL CASE

Title: Scott Wayne Blystone, Petitioner
v.
Pennsylvania

Docketed:
December 16, 1988

Court: Supreme Court of Pennsylvania,
Western District

Counsel for petitioner: Purcell, John M., Gettleman, Paul R.

Counsel for respondent: Barthold, Gaelle McLaughlin, Preate
Jr., Ernest D.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jan 24 1989		Order extending time to file response to petition until March 7, 1989.
6	Mar 6 1989		Brief of respondent Pennsylvania in opposition filed.
7	Mar 9 1989		DISTRIBUTED. March 24, 1989
9	Mar 27 1989		Petition GRANTED. limited to Question II presented by the petition. *****
12	Apr 27 1989		Order extending time to file brief of petitioner on the merits until May 31, 1989.
10	Apr 28 1989		Record filed.
13	May 26 1989	*	9 vol-PA Supreme Court
15	May 30 1989		Joint appendix filed.
16	Jun 7 1989		Order extending time to file brief of petitioner on the merits until June 7, 1989.
18	Jun 19 1989		Brief of petitioner filed.
19	Jul 20 1989		Order extending time to file brief of respondent on the merits until July 24, 1989.
20	Jul 21 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1989. (4TH CASE)
21	Jul 24 1989		Order further extending time to file brief of respondent on the merits until July 28, 1989.
22	Jul 28 1989		Brief amici curiae of California, et al. filed.
24	Aug 1 1989		Brief of respondent Pennsylvania filed.
23	Aug 25 1989		CIRCULATED.
25	Oct 10 1989	X	Reply brief of petitioner Scott W. Blystone filed. ARGUED.

ORIGINAL

88-6222

2

Supreme Court, U.S.
FILED
DEC 16 1988

JOSEPH F. SPANIO, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

SCOTT WAYNE BLYSTONE, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondant

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

DAVIS & DAVIS

Samuel J. Davis, Esquire
John M. Purcell, Esquire

107 East Main Street
Uniontown, Pennsylvania 15401 ☉
(412) 437-2799

Counsel for Petitioner

INDEX	
	Page
Questions presented.....	2
Opinions below.....	2
Jurisdiction.....	3
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case.....	6
How the Federal Questions Were Raised and Decided Below.....	7
Reasons for granting the writ	
I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE LOWER COURT'S DECISION IN GRANTING/AFFIRMING A COMMONWEALTH CHALLENGE FOR CAUSE OF A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS PROSPECTIVE JUROR'S BELIEF REGARDING CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR.....	8
II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.....	12
Conclusion.....	17

Appendix

	Page
Opinion and Judgment of the Supreme Court of Pennsylvania in this case.....	A-1
Opinion of the Court of Common Pleas of Fayette County, Pennsylvania, in this case.....	A-63
Portion of Trial Record in this case relating to the exclusion of Juror No. 102.....	A-141
Portion of Trial Record in this case regarding the Commonwealth's Closing Argument in Penalty Stage.....	A-145
Portion of Trial Record in this case regarding jury instructions in Penalty Stage.....	A-149
Portion of Trial Record in this case verdict slip in the Penalty Stage.....	A-160

TABLE OF AUTHORITIES

Cases:	Page
<u>Adams vs. Texas</u> , 448 U.S. 38, 45, (1980).....	10
<u>Eddings vs. Oklahoma</u> , 455 U.S. 104, (1982).....	12
<u>Franklin vs. Lynaugh</u> , 108 S.Ct. 2320 (1988).....	12
<u>Gregg vs. Georgia</u> , 428 U.S. 153 (1976).....	12
<u>Gray vs. Mississippi</u> , 107 S.Ct. 2045 (1987).....	11
<u>Hitchcock vs. Dugger</u> , 107 S.Ct. 1821 (1987).....	12
<u>Lockett vs. Ohio</u> , 438 U.S. 580 (1978).....	12
<u>Lockhart vs. McCree</u> , 106 S.Ct. 1758 (1986).....	11
<u>Wainwright vs. Witt</u> , 469 U.S. 412 (1985).....	10
<u>Witherspoon vs. Illinois</u> , 391 510.....	8
Constitution and Statutes:	
U.S. Constitution	
First Amendment.....	7, 11
Fifth Amendment.....	7
Sixth Amendment.....	7, 8, 10, 11
Eighth Amendment.....	7
Fourteenth Amendment.....	7, 8, 10, 11
28 U.S.C. §1257 (3).....	6
18 Pa. Cons. Stat. §903 3701 (A) (1982).....	6

18 Pa. Cons. Stat. §2502 (1982).....	2
42 Pa. Cons. Stat. §9711 (1982).....	2, 6, 13

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No.

SCOTT WAYNE BLYSTONE, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Scott Wayne Blystone, respectfully
prays that a writ of certiorari be issued to review the Judgment
and Opinion of the Supreme Court of Pennsylvania entered in this
proceeding on October 17, 1988.

QUESTIONS PRESENTED

I. WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS
UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION
OF THE UNITED STATES WERE VIOLATED BY THE EXCLUSION FOR CAUSE OF
A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS
PROSPECTIVE JUROR'S BELIEF REGARDING CAPITAL PUNISHMENT WOULD
PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS
A JUROR?

II. WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA
DEATH PENALTY STATUTE RENDERS SAID STATUTE FACIALLY
UNCONSTITUTIONAL OR RENDERS THE DEATH PENALTY IMPOSED UPON
PETITIONER UNCONSTITUTIONAL BECAUSE IT IMPROPERLY LIMITS THE FULL
DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE
PENALTY FOR A PARTICULAR DEFENDANT?

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania
presently sought to be reviewed, not yet reported, appears in
the Appendix hereto at A-2. The opinion of the Court of Common
Pleas of Fayette County, Pennsylvania, in this case, which is not
reported, appears in the Appendix at A-63.

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered on October 17, 1988 and this writ for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. This case involves the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Pennsylvania Consolidated Statutes:

18 Pa. Cons. Stat. §2502

(a) Murder of the first degree - A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

....

(d) Definitions - As used in this section the following words and phrases shall have the meaning given to them in this subsection.

....

"Intentional killing": Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

42 Pa. Cons. Stat. §9711 (1982):

(a) Procedure in jury trials:

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be

sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

....

(c) Instructions to the jury:

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (e) as to which there is some evidence.

(ii) the mitigating circumstance specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by the preponderance of the evidence.

(iiii) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

....

(d) Aggravating circumstances - Aggravating circumstances shall be limited to the following:

(6) The defendant committed a killing while in the perpetration of a felony.

(e) Mitigating circumstances - Mitigating

circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.
...

(4) The age of the defendant at the time of the crime.
...

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(h) Review of Death Sentence.

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) The sentence of death was the product of passion, prejudice or any other arbitrary factors;

(ii) The evidence fails to support the findings of an aggravating circumstance specified in subsection (d); or

(iii) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the Defendant.

STATEMENT OF THE CASE

On June 13, 1984, a jury found the Petitioner, Scott Wayne Blystone, guilty of murder of the first degree, robbery, criminal conspiracy to commit murder and criminal conspiracy to commit robbery. 18 Pa. Cons. Stat. §§2502(a); 3701(a); and 903. The jury that found the Petitioner guilty of these offenses had been selected through a voir dire process in which their beliefs concerning the death penalty had been extensively examined.

The evidence introduced at Petitioner's trial showed that the Petitioner, along with three (3) friends, picked up the victim while he was hitchhiking along a road in Fayette County, Pennsylvania. After picking up the victim, the Petitioner held him at gunpoint for the purpose of robbing him of any money he possessed. The evidence showed that after robbing the victim, the Petitioner proceeded to murder him to prevent his exposure of the robbery.

Immediately following the guilty verdict, a sentencing hearing was held pursuant to the Pennsylvania Death Penalty Statute, 42 Pa. Cons. Stat. §9711. No additional evidence was presented by either the Commonwealth or the Defendant at the sentencing hearing. The Commonwealth relied on the trial testimony and the Defendant refused to offer any evidence of mitigation. The Commonwealth attempted to establish the existence of only one statutory aggravating circumstance: that the murder took place during the perpetration of the felony of

robbery. Before returning with an appropriate verdict, the jury asked the trial judge to redefine what constitutes a mitigating circumstance (A-153). Ultimately, the jury returned a verdict of death finding that the aggravating circumstance of a murder committed during the perpetration of a felony had been proven beyond a reasonable doubt and that no mitigating circumstance had been established (A-160).

HOW THE FEDERAL QUESTIONS
WERE RAISED AND DECIDED BELOW

The federal issues that the Petitioner raises in this petition concern fundamental constitutional rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The issue concerning the exclusion of a prospective juror was presented throughout the state proceedings, initially through a trial objection and ultimately to the Supreme Court of Pennsylvania. The issue concerning the mandatory nature of the Pennsylvania Death Penalty Statute and its effect in this case was presented to the trial court, the Court of Common Pleas of Fayette County, Pennsylvania and the Supreme Court of Pennsylvania. Both of these courts rejected Petitioner's federal constitutional claims which are raised herein.

REASONS FOR GRANTING THE WRIT

- I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE GRANTING OF A COMMONWEALTH CHALLENGE FOR CAUSE OF A PROSPECTIVE JUROR WHEN THE RECORD DOES NOT SHOW THAT THIS PROSPECTIVE JUROR'S BELIEFS REGARDING CAPITAL PUNISHMENT WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR.

Under Witherspoon vs. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968), and its progeny, the right to an impartial jury under the Sixth and Fourteenth Amendments prohibits the exclusion of venire members for cause in capital cases unless their stated opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors. The Petitioner asserts that the exclusion of prospective juror No. 102 violates the aforesaid constitutional principal. The record indicates that the following colloquy took place in regard to Juror No. 102:

EXAMINATION BY MR. SOLOMON (District Attorney)

- Q. Do you know of any reason why you should not or could not serve on this jury?
A. No.
Q. If, after hearing all the evidence in this case, you believe the defendant to be guilty of murder in the first degree, could you return such a verdict?
A. Yes.
Q. If, after all the evidence in this case and the law as his Honor, Judge Adams will give you, and as a member of this jury you believe that the death penalty is warranted, would you impose such a penalty?
A. Does that mean "capital punishment?" I don't believe in that.

- Q. That is the death penalty.
Q. Do you have a moral or religious belief against capital punishment?
A. I am a Baptist and I don't believe in capital punishment.
Q. Is it against your religious beliefs to support capital punishment?
A. Yes, it is.
MR. SOLOMON: Challenge for cause.
MR. WHITEKO: I would object to the challenge based on her answer.
JUDGE ADAMS: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. I would overrule the objection.....

(A-143-144).

The lower court justified the exclusion of Juror No. 102 in the following manner:

This court, as to Juror number 102-Hattie M. Royster-had no difficulty in reaching the decision in that her attitude and manner as well as her words, indicated that she had personal and religious beliefs which prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and was properly excluded from the jury for cause.

(A-122-23).

The Supreme Court of Pennsylvania held that the record indicated

that this prospective juror could not carry out her duty to follow the law as the trial court instructed and, therefore, was properly excluded (A-15-17). The Petitioner respectfully asserts that the State Courts' determination amounts to constitutional error.

In Wainwright vs. Witt, 469 U.S. 412, (1985), this Court reexamined the Witherspoon rule clarifying the standard for determining whether prospective jurors may be excluded for cause based upon their views on capital punishment. This Court held that the only relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" Id., at 424, quoting Adams vs. Texas, 448 U.S. 38, 45 (1980). The state only has the right to exclude jurors who cannot follow the law as given to them by the trial court. Any broader exclusion would nullify a capital defendant's constitutional right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

In the present case, the answers given by the potential juror do not provide sufficient evidence to justify her removal. The questions and answers merely bring out that her religious beliefs do not allow her to support capital punishment. Such a belief does not justify her exclusion from the jury panel. The questions did not focus on the only relevant legal issue: whether she could follow the law in regard to capital punishment. As

this Court has stated:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart vs. McCree, 106 S.Ct 1758 (1986). In the present case, the prospective juror was never asked whether she could set aside her beliefs and feelings and follow the law. In fact, the prospective juror simply was asked about her own personal beliefs on capital punishment. The exclusion of this juror, on the basis contained in the record, not only violates the Petitioner's Sixth and Fourteenth Amendment rights, but also raises grave First Amendment questions concerning the rights of all prospective jurors. In any event, Witherspoon and its progeny do not constitutionally allow the exclusion of a prospective juror based merely upon a feeling concerning the death penalty. Because the prospective juror was improperly excluded, the Court should grant Certiorari and vacate Petitioner's sentence of death. Gray vs. Mississippi, 107 S.Ct 2045 (1987).

11. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.

The decisions of this Court in the capital context have demonstrated a commitment to the principle that the decision to impose the death penalty reflect an individualized assessment of the appropriateness of death for the particular crime and the particular defendant. This principal, that such punishment be directly related to the personal culpability of a criminal defendant, is the corner-stone of this Court's decisions in Lockett vs. Ohio, 438 U.S. 586 (1978), Eddings vs. Oklahoma, 455 U.S. 104 (1982), and Hitchcock vs. Dugger, 107 S.Ct 1821 (1987). These principals have also lead this Court to invalidate mandatory death penalty schemes because they fail to give the jury the opportunity to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence. Gregg vs. Georgia, 428 U.S. 153 (1976).

The Petitioner concedes that the decisions of this Court have allowed the states to structure or guide the jury's determination of the appropriate penalty. This guiding or channeling function has been approved most recently in Franklin vs. Lynaugh, 108 S.Ct. 2320 (1988). The Petitioner asserts that the mandatory nature of the Pennsylvania Death Penalty Statute goes beyond said permissible guiding and improperly limits the

full discretion the sentencer must constitutionally have in deciding the appropriate penalty.

Pennsylvania Death Penalty Statute provides that if the sentencer finds that an aggravating circumstance exists, and no mitigating circumstance exists, or if the sentencer finds that aggravating circumstances outweigh mitigating circumstances, "the verdict must be a sentence of death." 42 Pa. Cons. Stat §9711 (c) (iv) (Emphasis added). In the instance case, the trial court instructed the jury in accordance with this statutory command (A-151-56).

The use of the word "must" suggests that there is some context in which a juror or judge, who, after reviewing all of the evidence relating to the Defendant's character, record and the circumstances of the offense, feels that the penalty should be life, but is nevertheless required to return a verdict of death. In the present case, the jury's repeated questions regarding the meaning of "mitigating circumstances" can reasonably be interpreted as an attempt to find a way to spare the Defendant's life (A-157-59). However, under the statute and the charge of the trial court, this possibility was foreclosed.

The United States Constitution does not permit a state law to require death unless the sentencer was convinced that death was the appropriate penalty. The word "must" merely confuses the sentencer. Furthermore, use of this mandatory language can reasonably infer to the jury that they are not

actually making a moral judgment concerning the appropriate penalty, but rather, are bound by the law to return a verdict of death. In the present case, the jury's confusion over the definition of "mitigating circumstances" reflected their misapplication of the statutory scheme. It is just this idea that capital sentencing jurors are bound by the word "must" that allows prosecutors to argue that the jurors are not really choosing death at all.

In the present case, the District Attorney, in his closing argument of the sentencing phase, stated the following:

Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty; so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it You must determine from the evidence presented in this courtroom whether or not there are any mitigating circumstances; If not, you must follow the law and impose the death penalty. Once again, as in the initial proceedings where you determine guilt or innocence, you cannot be guided by sympathy for the

Defendant or the victim. You must follow the law and I am confident that you will.

(A-147-48). These characterizations of the jury's role by the District Attorney in this case are not accurate reflections of a jury's true role under a constitutional capital sentencing procedure. The fact that a sentencing jury finds that there are no mitigating circumstances or finds that aggravating circumstances outweigh mitigating circumstances, should mean that, after considering all of the evidence, the jury is convinced that death is the appropriate penalty. Of course, once they are so convinced, they should return a sentence of death. But this is their "duty" only in the sense that they are duty bound to make such a judgment in the case.

In such a circumstance, the word "must" would be unnecessary and inappropriate. The jury would return a sentence because they felt that it was the proper sentence. Accordingly, a reasonable juror will quite naturally assume that he is being told to return the death penalty against his will because it is his duty to do so. This is not true and could not be true, but it is a logical and reasonable inference of the statutory language, the jury charge, and the prosecutorial argument based

thereon. This is particularly true when a defendant, as in the present case, elects not to submit any mitigating evidence during the sentencing stage of his trial. As a result, the statutory procedure by which the Petitioner was sentenced to death was unconstitutional and the sentence of death should be vacated.

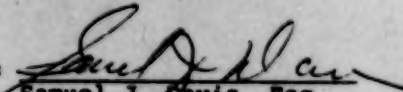
CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

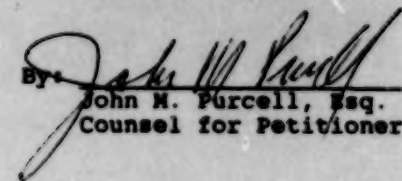
Respectfully submitted,

DAVIS & DAVIS

By:


Samuel J. Davis, Esq.
Counsel for Petitioner

By:


John M. Purcell, Esq.
Counsel for Petitioner

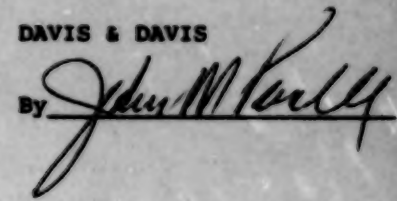
CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed a true and correct copy of the within document to the following persons and/or counsel by first class mail.

Alphonse P. Lepore, District Attorney
Fayette County Courthouse
Uniontown, Pa 15401

DAVIS & DAVIS

By:



DATED:

Dec. 16, 1988

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

SCOTT WAYNE BLYSTONE

:
:
: CRIMINAL ACTION NO. 2 of 1984, 2 1/4
of 1984, 2 2/4 of 1984 and 2 3/4 of
1984

ORDER

AND NOW, this 17 day of April, 1985, upon consideration of the foregoing motion, the Public Defender's Office is hereby permitted to withdraw from the within matter and Attorney Samuel J. Davis is hereby appointed to represent this defendant in all appeals currently before this Court and in any appeals which may follow either in this Court or in a higher Court.

BY THE COURT

Adams

ATTEST:

Chen
Clerk of Courts

APR 17 1985



SCOTT WAYNE BLYSTONE, : IN THE SUPREME COURT OF THE
Petitioner, : UNITED STATES OF AMERICA
vs. : OCTOBER TERM, 1988
COMMONWEALTH OF PENNSYLVANIA, :
Defendant. : NO.

ORDER

Petitioner, Scott Wayne Blystone, a prisoner at Western State Correctional Center of Pittsburgh, Pennsylvania, has submitted a Writ of Certiorari and request for leave to proceed in forma pauperis. Since it appears that he is unable to pay costs for commencement of said Writ, this following Order is entered this _____ day of _____, 1988:

IT IS HEREBY ORDERED, that the Petitioner's Motion to proceed In Forma Pauperis is granted and the Clerk is directed to file the subject Writ of Certiorari.

BY THE COURT:

ATTEST:

**SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

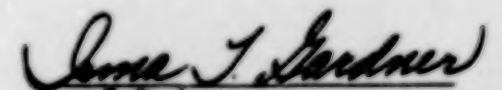
COMMONWEALTH OF PENNSYLVANIA
v.
SCOTT WAYNE BLYSTONE,
APPELLANT

No. 37 W.D. Appeal Docket, 1986
Appeal from the Judgments of Sentence
of the Court of Common Pleas of Fayette
County, Criminal Division, at Nos. 2,
2 1/4, 2 2/4 & 2 3/4 of 1984, entered
on April 17, 1986.

ARGUED: MARCH 9, 1987
REARGUED: MARCH 7, 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the convictions of the Court of Common Pleas of Fayette County, Criminal Division, of murder of the first degree, robbery, and criminal conspiracy to commit those offenses are sustained and the sentences of death and ten to twenty years imprisonment are affirmed.


Irma T. Gardner
Deputy Prothonotary

DATED: OCTOBER 17, 1988

J-33-88
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs

SCOTT WAYNE BLYSTONE,
Appellant

No. 37 W.D. Appeal Dkt. 1986

Appeal from the Judgments of
Sentence of the Court of
Common Pleas of Fayette County,
Criminal Division, at Nos. 2,
2 1/4 & 2 3/4 of 1984,
entered on April 17, 1986

ARGUED: MARCH 9, 1987
REARGUED: MARCH 7, 1988

OPINION

MR. JUSTICE McDERMOTT

FILED: OCTOBER 17, 1988

A jury found the appellant, Scott Wayne Blystone, guilty of murder of the first degree,¹ robbery,² criminal conspiracy to commit homicide,³ and criminal conspiracy to commit robbery.⁴ After further deliberation that same jury set the penalty for the murder conviction at death.⁵ The appellant was also sentenced to

¹18 Pa.C.S. §§2501; 2502(a).

²18 Pa.C.S. §3701.

³18 Pa.C.S. §903.

⁴Id.

⁵42 Pa.C.S. §9711.

ten to twenty years imprisonment for the robbery conviction.⁶ He directly appeals these judgments of sentence.⁷

It is the practice of this Court in cases in which the death penalty has been imposed to review the sufficiency of the evidence supporting an appellant's conviction. Commonwealth v. Zettlemoyer, 500 Pa. 16, 26-27 n.3, 454 A.2d 937, 942 n.3 (1982), cert. denied, 461 U.S. 970 (1983). We do so with an eye to see whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the jury to find every element of the crime beyond a reasonable doubt. Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (1976). In the instant case the evidence presented to the jury, together with all reasonable inferences in favor of the Commonwealth, discloses the following.

On the night of Friday, September 9, 1983, Scott Blystone, his girlfriend and another couple were riding around Fayette County in Blystone's automobile. Blystone, who was driving, worried about the fact that his automobile was low on gasoline and he had no money with which to purchase more. At approximately midnight, Blystone observed Dalton Charles Smithburger, Jr., hitchhiking. Blystone announced to his companions: "I am going to pick this guy up and rob him, okay, ...?" His friends endorsed the idea, or at best did nothing to oppose it, so Blystone pulled over

⁶18 Pa.C.S. §1103(1).

⁷See 42 Pa.C.S. §§722(4); 9711(h)(1). Pa.R.A.P. 702(b).

to pick up his victim. Unfortunately, Smithburger, who was not acquainted with anyone in the car, accepted the ride.

Once underway Blystone asked Smithburger if he had any money to contribute for the purpose of purchasing gasoline. Smithburger replied that he had only a few dollars and reached into his pocket. Dissatisfied with that response, Blystone drew a revolver which he held to Smithburger's head. In no uncertain terms Blystone ordered Smithburger to shut his eyes and place his hands on the dashboard. Smithburger understandably offered no resistance. Though in the course of a taped interview he would later admit that "I almost splattered him right there in the car," Blystone assured Smithburger that he would lose only his money, not his life.

Blystone pulled the car off the road at a lonely spot and walked Smithburger at gunpoint a short distance into an adjacent field. Blystone searched Smithburger, finding thirteen dollars. He ordered Smithburger to lie face down on the ground and wait. Smithburger complied. Blystone briefly returned to his companions in the car to inform them that he was going to kill Smithburger. The best that can be said for Blystone's friends is that perhaps they were startled into ambivalence by the enormity of the statement.

In any event Blystone decided to kill Smithburger. He returned to the field where he found his victim as he had left him. Blystone knelt on Smithburger's back and asked him whether he could identify the vehicle which had picked him up. Smithburger correctly replied, "all I know is it was green and the back end was

wrecked." Blystone then said, "goodbye" and emptied his revolver into the back of Smithburger's head.

Such "goodbyes" are rarely the end. Such deaths take on a life of their own and rattle through the lives of the those who know, until chance or nature loosens tongues. Appellant Blystone heard more than the voice of his passengers; he heard his own voice bragging in vivid and grisly detail of the killing of that unlucky lad. (See the Appendix attached to this opinion.)

Blystone eluded detection as Smithburger's murderer for over three months. However, his associates eventually exposed him. The testimonial evidence they contributed to the Commonwealth's case, along with physical evidence, would have been sufficient to support Blystone's convictions. Additionally, an audio tape of Blystone describing the murder to an informant was presented to the jury (See Appendix). The combined effect of all this material was to present the jury with evidence of the appellant's guilt which was more than sufficient; it was overwhelming.

Nevertheless, the appellant attacks the sufficiency of the evidence supporting his robbery conviction and, consequently, the imposition of the death penalty.⁸ Specifically, the appellant argues, the Commonwealth did not present sufficient evidence to satisfy the corpus delicti requirement for the crime of robbery.

⁸The only aggravating factor the jury found to exist for purposes of setting the penalty at death was the fact that Blystone killed Smithburger during the course of a felony, *i.e.*, robbery. 42 Pa.C.S. §9711(d)(6). Thus, the death penalty cannot stand should the robbery conviction fall.

To establish the corpus delicti of robbery, the Commonwealth must prove a theft by criminal means. Commonwealth v. Tallon, 478 Pa. 468, 475, 387 A.2d 77, 81 (1978). In other words, the Commonwealth bears a burden to show that the crime actually occurred.

The Commonwealth presented ample evidence, apart from the appellant's own admissions, that Scott Blystone did in fact rob Dalton Smithburger. Both of the young women in the car that night testified that the armed appellant took thirteen dollars from Smithburger. One of the women testified on this point as follows:

Q. [Prosecutor]: Did Scott say whether or not he took the money?

A. He didn't have no money on him before and that is how he got the gas is with that money.

Q. With that thirteen dollars?

A. With that thirteen dollars ...

Thus the appellant's argument on this point is meritless.⁹

Apart from the sufficiency of the evidence supporting this robbery conviction, the appellant asserts a second theory which would render this felony harmless for the purpose of setting the penalty for his murder conviction. Blystone argues that the robbery of Smithburger was completed prior to the murder and since

⁹The appellant also asserts that trial counsel was ineffective for failing to argue and preserve any corpus delicti issue relating to the robbery conviction. Since we have addressed the substance of the corpus delicti issue in our review of the sufficiency of the evidence, we will not consider the ineffectiveness claim.

the killing was not committed "while in the perpetration of a felony," 42 Pa.C.S. §9711(d)(6), he cannot be sentenced to death.¹⁰ This proposition is absurd.

The crime of robbery is clearly defined:

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

(iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

(v) physically takes or removes property from the person of another by force however slight.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

18 Pa.C.S. §3701(a).

The evidence concerning the robbery and killing was uncontroverted. The appellant searched his victim at gunpoint, taking thirteen dollars; forced him to lie down; and instructed him not to move unless he wished to die. Blystone then traversed the short distance to his automobile, remaining there only long enough to announce his murderous intent and gain the endorsement of his

¹⁰See note 8, supra.

companions. Meanwhile, Smithburger remained motionless on the ground out of fear that Blystone would fulfill his deadly promise should he resist or attempt to flee. Indeed, Blystone described in detail how he instilled doubt in Smithburger's mind as to whether his robber was merely a few feet away or fled the scene: "He never moved. He thought I was there. I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said 'don't think I am gone, mother-f---r,' and then I f-----g tiptoed off, you know." Upon his return from the automobile Blystone killed Smithburger; only then did he flee the scene. Thus, this robbery was not complete when Blystone took Smithburger's money, nor when Blystone went to his car, but when he successfully fled the scene after murdering his victim.

Finding the evidence sufficient to support the convictions, we turn our attention to what the appellant characterizes as errors of the trial court. The appellant contends that these rulings by the court tainted his trial in such a way that he must be granted another. We address these rulings of the trial judge in chronological order.

A particularly incriminating piece of evidence in the Commonwealth's arsenal consisted of a tape recording of a conversation between the appellant and a police informant (See Appendix). On the tape Blystone is heard to recall the Smithburger robbery and homicide in lurid detail. Of course, the appellant attempted to keep this evidence from the jury by means of a pre-trial suppression motion.

After a suppression hearing the trial judge denied the appellant's motion and portions of the tape were played before the jury during trial. The court found the tape admissible because the surveillance was conducted in compliance with procedures permitted under the Wiretapping and Electronic Surveillance Control Act¹¹ in that the informant consented to wear a "wire".¹² The Act provides in pertinent part:

§5704. Exceptions to prohibition on interception and disclosure of communications.

It shall not be unlawful under this chapter for:

...

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

...

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and

¹¹ Act of October 4, 1978, P.L. 831, No. 164, §2, 18 Pa.C.S. §5701 et seq.

¹² In this instance the informant carried a tape recorder as well as a body transmitter which enabled the police to remotely monitor and record the conversation.

that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

18 Pa.C.S. §5704(2)(ii).

The appellant argues that warrantless consensual monitoring, as authorized by the Act, violated his rights as guaranteed by Article 1, §8 of the Constitution of Pennsylvania, which provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

This argument has been recently accepted by the Superior Court. Commonwealth v. Schaeffer, 370 Pa.Super. 179, 536 A.2d 354 (1987).¹³ We, however, have not heretofore considered the matter.

A look at the history of wiretapping in this Commonwealth reveals that the General Assembly has been cognizant of intrusions into the personal liberties of our citizens. For instance, our original statute dealing with the issue of wiretaps forbade any

¹³It should be noted that prior to the Superior Court's opinion in Commonwealth v. Schaeffer, 370 Pa.Super. 179, 536 A.2d 354 (1987), no court in this Commonwealth had accepted the position espoused by appellant. See Commonwealth v. Harvey, 348 Pa.Super. 344, 502 A.2d 679 (1985); Commonwealth v. Hassine, 340 Pa.Super. 318, 490 A.2d 438 (1985). See also United States v. Geller, 360 F.Supp. 1309 (E.D.Pa. 1983), aff'd sub nom. United States v. DeMaise, 745 F.2d 49 (3d Cir. 1984), cert. denied, 469 U.S. 1109 (1985). Therefore, the trial judge's rejection of appellant's position on this issue was consistent with precedent.

wiretapping unless all parties consented.¹⁴ However, the current electronic surveillance statute strikes a balance between citizens' legitimate expectation of privacy and the needs of law enforcement officials to combat crime. In this regard the General Assembly has provided safeguards to protect the liberties of the citizens of the Commonwealth. For instance, the statute requires the Attorney General, deputy attorney general designated in writing by the Attorney General, district attorney, or an assistant district attorney designated in writing by the district attorney, to make a review of the facts of each case. Consent for the interception must be given by one of the parties. The Attorney General, deputy attorney general, district attorney, or assistant district attorney must be satisfied that the consent is voluntary. Only then will approval for the interception be given. In addition, the intercepted communications are subject to strict record keeping requirements.¹⁵

Appellant contends, however, that despite these safeguards the statute fails to pass constitutional muster. We disagree.

A statute commands the presumption of constitutionality when it is lawfully enacted, unless it clearly, palpably, and plainly violates the constitution. Hayes v. Erie Ins. Exchange.

¹⁴Act of July 16, 1957, P.L. 956, No. 411 §1, 18 P.S. §3742. See Commonwealth v. Papszycki, 442 Pa. 234, 275 A.2d 28, (1971).

¹⁵See 18 Pa.C.S. §5714(a).

493 Pa. 150, 425 A.2d 419 (1981); Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975). Any doubts are to be resolved in favor of sustaining the legislation. Hayes, supra, at 155, 425 A.2d at 421.

In the area of electronic surveillance it has already been established that one-party consensual interceptions do not violate the Fourth Amendment. United States v. Caceres, 440 U.S. 741 (1979); United States v. White, 401 U.S. 745 (1971) reh. denied, 402 U.S. 990 (1971) (plurality opinion). However, since state courts are free to provide broader protections based on state constitutional grounds than those provided by the federal constitution, Cooper v. California, 386 U.S. 58 (1967) reh. denied, 386 U.S. 988 (1967); Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 (1983), the federal precedents are not controlling, and consideration of our state constitution is required.

It has been held that the protection provided by Article I, §8 of the Pennsylvania Constitution extend[s] to those zones where one has a reasonable expectation of privacy, Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) cert. denied, 444 U.S. 1032 (1980); and that Article I, §8 creates an implicit right to privacy in this Commonwealth. Commonwealth v. Platou, 455 Pa. 258, 312 A.2d 29 (1973) cert. denied, 417 U.S. 976 (1974). To determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable. Commonwealth v. Sell, supra; Katz v. United States, 389 U.S. 347, 360 (1967) (Concurring

Opinion, Harlan, J.); Commonwealth v. Tann, 500 Pa. 593, 459 A.2d 322 (1983).

The United States Supreme Court has held that a person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal that conversation to the police. Lopez v. United States, 373 U.S. 427 (1963) reh. denied, 375 U.S. 870 (1963); United States v. White, supra; Hoffa v. United States, 385 U.S. 293 (1966) reh. denied, 386 U.S. 940 (1967). Furthermore, as noted above, the Court has held that one party interceptions do not violate the Fourth Amendment. United States v. Caceres, supra.

Basically, the Supreme Court has recognized the simple fact that a thing remains secret until it is told to other ears, after which one cannot command its keeping. What was private is now on other lips and can no longer belong to the teller. What one chooses to do with another's secrets may differ from the expectation of the teller, but it is no longer his secret. How, when, and to whom the confidant discloses the confidence is his choosing. He may whisper it, write it, or in modern times immediately broadcast it as he hears it.

As applied to this case the above cited cases are particularly significant for two reasons: one, the Pennsylvania wiretapping statute is based on its federal counterpart, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. §§2510-20,¹⁶ the latter of which was cited with approval by the United States Supreme Court in Caceres, id., at 742,¹⁷ and two, it is the federal body of law from which we derive our test for determining what actions fall under the rubric of a privacy right, Katz, supra, (Concurring Opinion, Harlan, J.).

Although, unless dictated by Supremacy Clause considerations, we are not bound to follow the federal interpretation of the federal act or the federal constitution in the interpretation of our state statute and/or constitution, we are in this case, persuaded by the rationale behind those decisions. As Mr. Justice White stated in the lead opinion in United States v. White,

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. Hoffa v. United States, 385 U.S. at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, Lopez v. United States, supra; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. On Lee v. United States, supra [343 U.S. 747 (1952)]. If the conduct and revelations made of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does

¹⁶Public Law 90-351, Title III, §802, June 19, 1968, Stats. 213.

¹⁷See also, Gelbard v. United States, 408 U.S. 41 (1972); United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978).

a simultaneous recording of the same of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

401 U.S. at 751.¹⁸ (These statements were cited with approval in Caceres, supra, at 742-43).

Therefore, since we find no constitutional defect in the statute, and since the Commonwealth in this case operated in compliance with the statute, the appellant's vivid recounting of the brutal murder of Dalton Smithburger was properly admitted.

Appellant next argues that the trial court improperly sustained a Commonwealth challenge for cause of a prospective juror because that juror's opposition to the death penalty did not illustrate an inability to perform as a juror. The relevant voir dire testimony follows.

¹⁸Mr. Justice White further stated:

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat of injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

United States v. White, 401 U.S. 745, 753 (1971).

Q. [Prosecutor]: If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?

A. Does that mean "capital punishment"? I don't believe in that.

Q. That is the death penalty. Do you have a moral or religious belief against capital punishment?

A. I am a Baptist and I don't believe in capital punishment.

Q. It is against your religious beliefs to support capital punishment?

A. Yes, it is.

[Prosecutor]: Challenge for cause.

[Defense Counsel]: I would object to the challenge based on her answer.

Judge Adams: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. We would overrule the objection. Mrs. [prospective juror], we would advise you that you are not going to be asked to serve on this jury because of your feeling. I would ask you please not to discuss with any other juror the questions that were asked you or your reasons for being excused. Thank you. You may step down.

(Emphasis added).

A determination of whether to disqualify a prospective juror is made by the trial judge based on both that juror's answers as well as demeanor, and will not be reversed absent a palpable abuse of discretion. Commonwealth v. DeHart, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 3241 (1987).

The trial court clearly considered these criteria in granting the Commonwealth's challenge.

This court, as to Juror Number 102, had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that the court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and was properly excluded from the jury for cause.

Slip op. at 60-61. Though the trial court is apologetic for the state of the printed record, that concern is unnecessary. For the purpose of ruling on the Commonwealth's motion, the dispositive questions were posed and answered as indicated by our emphasis. This exchange shows this prospective juror could not carry out her duty to follow the law as the trial judge would instruct and, therefore, was properly excluded. Commonwealth v. Sneed, 514 Pa. 597, 526 A.2d 749 (1987); Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 962 (1987). See Lockhart v. McCree, 476 U.S. 162 (1986).

The appellant's final assertion of error on the part of the trial court concerns the testimony of the victim's father, Dalton Charles Smithburger, Sr. Appellant argues that the trial court erroneously permitted the Commonwealth to introduce testimony of the victim's character, intelligence and propensity to follow orders. The appellant contends that the impact of this testimony was to create sympathy for the victim which was irrelevant for purposes of determining the guilt or innocence of the defendant.

Initially, we note that the appellant has waived this issue by failing to object to this specific testimony. The sidebar conference during which the appellant's trial counsel voiced his objection follows.

[Defense Counsel]: We would stipulate to the testimony of Mr. Smithburger if it is merely to the fact that he identified the body as his son.

[Prosecutor]: I intend to offer him to testify as to (1) when he last saw his son and (2) what he was wearing and (3) where he made identification of the body and also (4) what type of student his son was. [parentheticals added]

[Defense Counsel]: I would stipulate to the testimony as to (3) his identifying his son, but I don't see any relevancy to (1) the last time he saw his son and (2) what he was wearing, and I would object. [parentheticals added]

Judge Adams: Does the Commonwealth wish to call him in light of the stipulation?

[Prosecutor]: Yes.

Judge Adams: We will permit you to call him. We would overrule the objection.

It is apparent from this record that the prosecutor offered this witness to address four factual matters. The appellant's trial counsel was willing to stipulate to one of these points and objected to two others. The fourth matter, which is the issue here, was not opposed then or later and, therefore, has been waived.

However, it is of little import that the appellant did not technically preserve his objection because the substantive argument supporting it is meritless. That argument points to the following testimony as prejudicial to the appellant.

Q. [Prosecutor]: Mr. Smithburger, what kind of student was your son?

A. Well, he went to Tech School and he passed his welding class.

Q. How would you describe your son? Was he a troublemaker?

A. No, never a troublemaker.

Q. How was he as far as listening?

A. He listened pretty good.

Q. If someone were to tell him something, would he do it?

A. Yes, he would.

Q. I believe you told the police that he was in special education?

A. Yes.

[Prosecutor]: I have no further questions.

Evidence which has the effect of arousing sympathy for a crime victim is prejudicial and inadmissible when otherwise irrelevant. Commonwealth v. Story, 476 Pa. 391, 402, 383 A.2d 155, 160 (1978). In this case it is not apparent that the above testimony had the threshold impact of evoking sympathy for the victim in the minds or hearts of the jurors. The assessment of the trial court was that the "testimony was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury." Slip op. at 36. The mere characterization of the victim as an individual having a learning disability does not make his homicide more, or less, heinous.

Furthermore, this evidence was probative of the victim's passive nature and thereby lent credence to the Commonwealth's account of events prior to his death. Specifically, evidence of

the victim's passiveness served to explain, at least in part, why Smithburger remained prone in the field while Blystone was at his automobile discussing with his companions the necessity of killing him. The appellant himself in his taped statement admitted that he was surprised by Smithburger's obedience.

I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f---r ain't going to lay there, but I wanted to warn them - you know, Jackie and George - I wanted to warn them that I was going to waste him - I went back. I went back just expecting this mother-f---r to be through the fields. I had to laugh.

The testimony of Mr. Smithburger, being more probative than prejudicial, was properly allowed by the trial court. See Commonwealth v. Ulatoski, 472 Pa. 53, 63 n.11, 371 A.2d 186, 191 n.11 (1977). See also Commonwealth v. Story, *supra*, at 402, 383 A.2d at 160.

In addition to allegations of error on the part of the trial court, the appellant asserts that his trial counsel was ineffective because he failed to investigate and present an alibi defense. Blystone, represented by a different attorney, presented this complaint to the trial court long after the jury rendered its verdicts and set the appropriate penalty for the homicide conviction. After a post-trial hearing conducted to air this grievance the trial court determined that appellant's argument was meritless. We concur.

Initially, we note the appellant did not comply with the mandatory notice provision of the rule governing the presentation of an alibi defense, which provides:

C. Disclosure by the Defendant

(1) Mandatory.

(a) Notice of Alibi Defense. A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

Pa.R.Crim.P. 305.C.(1)(a). The consequences to a defendant who ignores the notice provision are also made clear in the rule:

(d) Failure to File Notice. If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

Pa.R.Crim.P. 305.C.(1)(d).

This was not, however, an instance in which the alibi defense was barred simply because of a failure to comply with the Rules of Criminal Procedure. Blystone chose to present no defense whatsoever after the conclusion of the Commonwealth's evidence. At that point in the proceedings the trial judge conducted a colloquy out of the jury's presence to ensure that the appellant understood his right to advance evidence on his behalf. The appellant gave no indication to the trial court that an alibi defense was feasible. Consequently, there was not even an opportunity for the court to

abuse its discretion in the application of the alibi defense rule, Pa.R.Crim.P. 305.C.(1).

Additionally, it is apparent from the record of the post-trial hearing that Blystone's alibi was a fabrication. At that proceeding the appellant waived the attorney-client privilege of confidentiality existing between him and his trial counsel. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts as recited to him by Blystone. In other words, the alibi witnesses would be perjuring themselves. It was also apparent that Blystone did not tell his trial counsel of the possibility of establishing his presence elsewhere at the time of the crime until after the Commonwealth rested its case.

During the post-trial hearing the trial court, through its own diligence, went so far as to locate one of the appellant's alibi witnesses and import her from West Virginia for the purpose of testifying at the proceeding. After hearing the witness' testimony, and juxtaposing it with that which she had rendered in a separate prosecution arising from the same incident, the trial court found the witness was not credible. Slip op. at 56.

This Court will not label counsel ineffective for failing to suborn perjury. Therefore, the appellant's argument is meritless.

In addition to the claims already aired, the appellant raises three arguments challenging the constitutionality of the death penalty. One of these arguments is couched in terms of error by the trial court. The appellant asks: "Whether the trial court

erred in denying the defendant's motion for an evidentiary hearing to present testimony concerning the prosecution-proneness of the jury that convicted him?" To accept the appellant's contention of error, would be to accept the worth of his substantive argument to the effect that death qualified juries are prosecution-prone. We will not do this. Commonwealth v. DeHart, *supra*, at 250-53, 516 A.2d at 664-665. See Lockhart v. McCree, *supra*.

The appellant next asserts that the death penalty statute is unconstitutional under both the United States and Pennsylvania Constitutions because of its mandatory language. The part of the statute operative in this instance states: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance ... and no mitigating circumstance," 42 Pa.C.S. §9711(c)(1)(iv). We will not dwell on this issue beyond noting that the appellant's argument was expressly refuted in the case of Commonwealth v. Peterkin, *supra*, at 326-28, 513 A.2d at 387-88.

The appellant also argues that this Commonwealth's death penalty sentencing statute violates his Eighth Amendment protection against cruel and unusual punishment¹⁹ because the operative aggravating circumstance in this case²⁰ is overbroad, arbitrary,

¹⁹The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962), *reh. denied*, 371 U.S. 905 (1962).

²⁰The pertinent portion of the sentencing statute states:

(d) Aggravating circumstances. - Aggravating
(Footnote Continued)

and does not differentiate those murders which justify the penalty from those which do not.

The statutory procedure governing the imposition of the death penalty in this Commonwealth channels the discretion of the sentencing body to prevent the arbitrary and capricious imposition of capital punishment. Commonwealth v. DeHart, supra; Commonwealth v. Zettlemyer, supra. Since we have previously held that the sentencing system on its face does not operate in an arbitrary or capricious manner, Blystone cannot prove a violation of his constitutional rights by mere assertions that other defendants who were similarly situated did not receive death sentences. See McCleskey v. Kemp, ___ U.S. ___, ___, 107 S.Ct. 1756, 1774 (1987), reh. denied, ___ U.S. ___, 107 S.Ct. 3199 (1987). The focus of his challenge must, therefore, be upon the sentencing mechanism as it has been employed to render his death sentence.

A sentence of death is not merely the product of evidence which supports a particular aggravating circumstance. The Commonwealth must first prove beyond a reasonable doubt that an aggravating circumstance applies to the particular homicide. Thus, an aggravating circumstance has no relevance in the abstract; it can only be applied against an individual defendant by the particular

(Footnote Continued)

circumstances shall be limited to the following:

- ...
- (6) The defendant committed a killing while in the perpetration of a felony.

42. Pa.C.S. §9711(d)(6).

sentencing body weighing the evidence before it. Should the fact-finder determine the Commonwealth has satisfied its burden of establishing the aggravating circumstance, then, and only then, does a penalty of death become cognizable. Therefore, the establishment of an aggravating circumstance represents the crossing of a threshold from a condition in which the sentencer cannot render a verdict of death to one in which it must. 42 Pa.C.S. §9711(c)(1)(iv).

However, an individual may thwart the imposition of the death penalty by offering evidence of mitigating circumstances concerning his character, record, and the circumstances of the offense. 42 Pa.C.S. §9711(e). In this manner the fact-finder may consider any relevant circumstance that could cause it to decline to impose the death penalty. A balancing of aggravating and mitigating factors which favors the defendant cannot be reversed, as that determination by the sentencing body is unreviewable. On the other hand, a sentence of death produces an automatic appeal to this Court in which we will curb abuses of the trial or sentencing proceeding.²¹

²¹The Sentencing Act provides:

(h) Review of death sentence. -

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death

(Footnote Continued).

There is no question that the death penalty may be constitutionally imposed for a murder committed in the course of a planned robbery. McCleskey v. Kemp, *supra*, at ____, 107 S.Ct. at 1774; Gregg v. Georgia, 428 U.S. 153 (1976), *reh. denied*, 429 U.S. 875 (1976). In this case the jury expressly found this aggravating circumstance to exist and, thus, Blystone's case rose above the level below which the death penalty may not be imposed. Since he refused to present any evidence of mitigation, there was nothing to block that passage. Based on its finding that there existed one aggravating and no mitigating circumstance the jury returned a sentence of death. We find no fault with the sentencing body's performance of its duty.

Finally, it is the practice of this Court to examine, *sua sponte*, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

(Footnote Continued)
and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

- (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
- (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
- (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. §9711(h).

considering both the circumstances of the crime and the character and record of the defendant. Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied*, 469 U.S. 963 (1984). In examining this claim we emphasize that the statute requires a verdict of death in those instances in which the jury finds one or more aggravating circumstances and no mitigating circumstance, 42 Pa.C.S. §9711(c)(1)(iv). Thus, by the very terms of the statute the death penalty cannot be considered excessive to the circumstances of this defendant.

Further, we note that the continuing study of capital cases maintained by the Administrative Office of Pennsylvania Courts (AOPC) reveals that Blystone's punishment is not out of proportion to that imposed on similarly situated defendants.²²

For the foregoing reasons, we sustain the convictions of murder of the first degree, robbery, and criminal conspiracy to commit those offenses. The sentences of death and ten to twenty years imprisonment are affirmed.²³

Mr. Justice Zappala files a Dissenting Opinion in which Mr. Justice Larsen joins.

²²The AOPC study indicates that in those instances in which sentencing bodies have found one or more aggravating circumstances to exist in the absence of any mitigating circumstances, a sentence of death was returned in the overwhelming majority of those prosecutions.

²³The Prothonotary of the Western District is directed to transmit to the Governor a full and complete record of the proceedings of this case both in the trial court and this Court. 42 Pa.C.S. §9711(i).

APPENDIX

THE FOLLOWING IS AS THE TAPE WAS HEARD BY THE COURT REPORTER:

BLYSTONE: Do you remember the body they found along the road next to the Redhead -- along the Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger -- found him laying in a field shot six times.

MILLER: I don't read the f-----g paper.

BLYSTONE: Shot six times in the head.

MILLER: Six times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-b----, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what - go to the library.

MILLER: I am not going to no f-----g library.

AT THIS POINT JUDGE ADAMS ASKS THE OFFICER TO STOP THE TAPE. HE THEN INQUIRED OF THE JURORS WHETHER OR NOT THEY COULD HEAR THE TAPE AND SOME OF THE JURORS RESPONDED THAT THEY COULD HEAR PORTIONS OF IT BUT SOME OF THE PORTIONS THEY COULD NOT UNDERSTAND.

JUDGE ADAMS: The tape gets stronger as it goes along. You may continue, officer.

OFFICER THEN CONTINUES TO PLAY THE TAPE, AND THE FOLLOWING IS THE TAPE AS HEARD BY THE COURT REPORTER:

BLYSTONE: Me and Jackie -- you got to keep this quiet -- we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of s--- and that wasn't working so I said "f--- it - I'm going to just drive up and blow somebody's brains out and take their wallet." George was with us. Don't burn me.

MILLER: You think I'm going to f-----g go to the state cops, man, and tell them "hey, look, and all this and that, I know this about Scott Blystone."

BLYSTONE: Don't even tell Jackie that I told you this or she'll f-----g flip. Anyway, there's this guy hitchhiking (inaudible to reporter) and it was about 11:00, and we picked him up. Jackie is sitting in the middle, and so he got in, you know, and he said he was going up over the mountains, and I said "that's where we are headed." I said "we need gas money" and he said "well, I got a little bit." You know how everybody says they got a little bit.

MILLER: Yeh.

BLYSTONE: So I said "how much you got?" He said "not that much but I can give you something for gas" and then we pulled up to the foot of the mountain -- that road that turns off from Hopwood.

MILLER: Taste this man. This is bad.

BLYSTONE: I pulled off and I said "I got to make sure, man, before I go up this mountain 'cause I ain't got gas to get back and then what the f--- would I do."

MILLER: Wait a minute, you picked this guy up?

BLYSTONE: Yeh, in Hopwood on Route 40. I knew what I was going to do. I told everybody what I was going to do.

MILLER: Before you did it?

BLYSTONE: Yeh. They thought I was bull-s-----g. Everybody thinks that Scott bull-s---s.

MILLER: Ain't that good apple pie?

BLYSTONE: It is pretty good.

MILLER: I told you you should have got one.

BLYSTONE: You don't believe this, do you?

MILLER: Go ahead.

BLYSTONE: He said something that ticked me off, you know, like "I can only give you a few dollars" or something like that, and so I pulled the gun out and stuck it around behind Jackie and I put the gun to his head and I said "get your f-----g hands on the dashboard," and then I started reaching in his f-----g coat. That's the part I got to leave out, that and one other part.

MILLER: Did he have a gun?

BLYSTONE: No, but I thought he did, and I almost splattered him right there in the car. That's when the car was wrecked -- the back end was real f----d up, real identifiable. I told everybody what I had to do. So (inaudible to reporter) I said to him "get them on the dashboard, put them up there" and then we went out the Brownfie'd Road and stopped for a second. I told George - I said "you get ahold of him until I get out of the car and come around to the other side." I didn't want this mother-f----r to get out and run, you know.

MILLER: George was holding him in the car, huh?

BLYSTONE: George was scared to death.

MILLER: He held him there, didn't he?

BLYSTONE: F-----g right.

MILLER: He didn't?

BLYSTONE: I went around the other side of the car and put the gun to him and said "get out." I went back in the field with him. "George, come on" I said, "help me." George kept f-----g around. Jackie told me that George was back there making excuses -- "I got to light a cigarette" and "just a minute" and (inaudible to reporter) and "I'm getting out" and all this s---.

MILLER: He was scared.

BLYSTONE: In the meantime I had him back there searching him. If found his money (inaudible to reporter) which wasn't f-----g much at all.

MILLER: How much was it?

BLYSTONE: I guess I can tell you because the cops wouldn't know -- \$13.00.

MILLER: \$13.00?

BLYSTONE: Yeh, unlucky mother-f----r, it was a Friday and he had \$13.00. I said "where's the rest" and he said "that's all I got." I told him "lay down," and I said "you wait right here. I'll be right back." I said "don't move or I'll blow your f-----g brains out." He said "I ain't going nowhere."

MILLER: You going to eat these fries?

BLYSTONE: No, go ahead. So then I ran back to the car. I said "he has got" (inaudible) -- I didn't know how much it was. I said "he has got about \$15.00 on him."

MILLER: Ain't no wonder you don't want them, man; they are f-----g cold.

BLYSTONE: I said "he can identify us - he was looking." He kept looking. I kept telling him "close your f-----g eyes, you mother-f-----r."

MILLER: When he was down on the ground?

BLYSTONE: No, when he was in the car. He kept looking at us, you know, and he was looking in the back seat and I said "shut your f-----g eyes, man." He'd go (some sort of sound), and I said "turn your f-----g head." He would turn his head like that, and I said "man, you're dead." So then I ran back to the car and told them "I got to kill him," -- said "can everybody handle it."

MILLER: You left him there and you ran back to the car?

BLYSTONE: He never moved. He thought I was there.

(inaudible) I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said "don't think I am gone, mother-f-----r," and then I f-----g tiptoed off, you know. I told them I said "I'm going to kill him." Everybody said "yeh, go ahead, kill him," - you know, so I f-----g ran back there and got over top of him and I said "what kind of car were you in tonight?" He said "I wasn't driving, man." He said "I told you I don't have a car," and I said "what kind of car picked you up?" He said "all I know is it was green and the back end was wrecked." I said "goodbye" and he tightened up, and I f-----g

wasted him. Blood splattered all over me, and then I came running back to the car -- jumped in the car. Jackie had it in drive. I shot him six times. You should have heard it, man -- pow, pow, pow, pow, pow, pow. Brains started oozing out of this f---. Every hole I would put in his head, brains would start oozing out each time I shot him, right?

MILLER: Uh-huh.

BLYSTONE: I found brains on my nose. Jackie picked them off my face that night. I jumped in the car, and the car was f-----g rolling. We went back to George's house and got the blood off me.

MILLER: I bet they was scared. They probably thought you was bull-s-----g.

BLYSTONE: I know. It's like they didn't believe me. I had blood all over me.

MILLER: Was George there?

BLYSTONE: Yeh.

MILLER: He was right there?

BLYSTONE: No, he didn't get out of the car. He never got out of the car. Then I ran back, and I didn't say nothing to him until later on and I said "man, you were supposed to be with me." Then Jackie told me what he was doing - he was stalling. I left some evidence back there. When I was searching him I pulled out a pack of cigarettes and I picked up the pack with my bare hand. We sat around (inaudible).

MILLER: Pack of cigarettes?

BLYSTONE: I know for two hours we sat at the house. I sat there and I said "man, they can't get the footprints - there is a

million out there." "There ain't no scrapings under his nails or nothing, or under mine," and I said "we got all the blood off." I kept telling them "get that pack of cigarettes." I said "that's the only thing that can get me." I said "f--- it - we are going back down," and then we ran out of gas - we ran out of gas out there.

MILLER: Where at?

BLYSTONE: Right after we went back.

MILLER: You ran out of gas right there?

BLYSTONE: About 200 yards from it.

MILLER: Back towards the gas station?

BLYSTONE: Uh-huh.

MILLER: You didn't have far to walk then?

BLYSTONE: Huh-uh. Anyway, we got back there, and I told George -- I said "look, the place might be staked out." I said "we are going to get out of the car like we are taking a p---," and I said "I'll take you over to the body and stand there and just keep talking -- bull-s-----g" and then I said "you look over and notice and say 'hey, what's that'?"

MILLER: You like that apple pie?

BLYSTONE: Uh-huh. So we get over there, right -- get out of the car.

MILLER: I'd like another bite of that mother-f-----r too.

BLYSTONE: (inaudible to reporter).

MILLER: You should have bought one of these. You should have let me buy you one.

BLYSTONE: We get out of the car, pull our d---s out and start p-----g, and George says "what's that?"

MILLER: You didn't p--- on him, did you?

BLYSTONE: Huh-uh. George said "what's that -- look" and we were talking nice and loud in case there was any cops in the bushes. He said "right there" and I said "I don't know" and I said "my God, it looks like a body" and George said "no, man" and I said "look, man, it is a f-----g body."

MILLER: In case there was somebody around?

BLYSTONE: (inaudible to reporter) went back there and said "if you ask me, George, I blew his head off, man."

MILLER: (inaudible).

BLYSTONE: So he said "my God, we had better call the police." I said "yeh, let's look for some I.D. and see if we can find out who he is." I started looking. I had this f-----g light -- looking around.

MILLER: Just in case there was somebody around?

BLYSTONE: Right. I said "try to find some I.D. on him." I knew we were looking for the cigarette pack -- couldn't find it nowhere. Then I remembered when he laid down - when I took the stuff off of him, I threw it down in front of him. I threw it down in front of him when he laid down -- he laid straight down.

MILLER: On his face?

BLYSTONE: I said "George, it must be under his f-----g body" and we walked over. George put the light on this guy. I grabbed him by his f-----g coat, pulled him up -- moved him up, and man, he was nothing but a pool of blood. One eye was out and his f-----g

eyebrows - his whole brow, man, was like real swollen -- looked like somebody had beat him with a baseball bat, -- cheeks were all swollen. There was holes in them and coming out of his throat, and s---, his teeth were in the ground. They were blown in the ground.

MILLER: Big time, huh?

BLYSTONE: This f-----r was done -- he was a f-----g mess. I tell you he was drenched in f-----g blood. I picked the pack up and I stuck it in. I said "man, let's call the police." We jumped back in the car, went back to the house, and waited all night.

MILLER: You took that pack of cigarettes off of him?

BLYSTONE: We smoked them. They had blood on the filters and we smoked the f-----g cigarettes, and we waited right. We kept waiting and waiting to hear something on the TV or the radio.

MILLER: Were they "Kools," man?

BLYSTONE: No, I can't tell you what they were 'cause that's another thing too -- they were unusual.

MILLER: I don't give a f---.

BLYSTONE: Then we went back two or three hours later, right.

MILLER: You went back three times?

BLYSTONE: Twice.

MILLER: Oh.

BLYSTONE: I killed him and then we went back for the cigarettes, and (inaudible) -- So we went back to the house, right, and we are sitting around listening and waiting -- just f-----g waiting. I think about --

MILLER: You went back to George's house?

BLYSTONE: Uh-huh.

MILLER: After you done run out of gas?

BLYSTONE: Well, when we left there the second time when we got the f-----g cigarettes, we are going up the f-----g road and the car goes (sound) -- oh, f---, man, I put it in neutral and drifted it as far as I could and then pushed it over to the gas station, and then this dude got us some gas downtown.

MILLER: You must have been right up on top of the hill then?

BLYSTONE: Yeh -- so anyway, about 11:00 the next day --

MILLER: Because I know you and George can't push that car up that f-----g hill.

BLYSTONE: Not uphill, no. It drifted a good ways. I was rolling. When I came out I was rolling. We were acting like we found a dead body. So the next day we all went to sleep for three or four hours, and got up and turned it on, and we were waiting and waiting -- nothing, man -- no TV, no radio, nothing. They had to find him. I said "they should have found him at the crack of dawn." Finally on WPQR "we interrupt this" -- you know how they bull-s--- -- "body of an unidentified man found" I don't even think they said "shot to death" -- they said where he was - that he was dead, and about an hour or so later then said that he was shot. Then it came out in the papers that he was shot six times in the head, and they kept talking about it on the radio.

MILLER: This next day?

BLYSTONE: Yeh. It was on TV and it was on the news -- 6:00 news. It was in the paper for about three days that the State Police needed help in the slaying -- that a man was shot with a .22

caliber pistol six times in the back of the head along Brownfield Road, and that he was 6-3 and weighed, I think, 195.

MILLER: Is that the gun we shot off my porch?

BLYSTONE: I wasted him, Miles. That mother-f----r, when I got over him, I was down ----

MILLER: You still got that f-----g thing now?

BLYSTONE: That's why I told you I couldn't sell it - the murder weapon.

MILLER: I hope you got that mother-f----r put away.

BLYSTONE: I buried it. I bent down over top of him ---

MILLER: Up there at your dad's house?

BLYSTONE: In the woods. I put it down to his head, and when I shot, man, the barrel was only this far from his face. Every time I fired, f-----g s--- would splatter in my f-----g face. I got up and ran back to the car, but they didn't believe it. Everybody was real (inaudible) - real calm 'cause all they could hear was shots. We went back -- Jackie saw it -- couldn't have been right from here to the car, and when George lit that lighter and I picked him up, you could see his face and he looked like a f-----g ghoul -- like a mummy or something. His face was all f-----g swollen and black and blue. His eyes were clouded over. His f-----g teeth -- blew all his f-----g teeth out, and about half of his jaw came off, but nothing ever happened. Nobody ever came to us. Nobody ever ask no questions - nothing -- it's an unsolved murder.

MILLER: Man, oh, man.

AT THIS POINT THE TAPE WAS STOPPED.

JUDGE ADAMS: Officer, you may go into my chambers to adjust the tape.

THE OFFICER AND ATTORNEY SOLOMON GO INTO THE JUDGE'S CHAMBERS TO ADJUST THE TAPE.

AFTER DOING SO, THE OFFICER AND ATTORNEY SOLOMON RETURN TO THE COURTROOM AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: What I am trying to tell you, man, is -- it's easy. It's f-----g easy, you know.

MILLER: To kill somebody?

BLYSTONE: To get away with it.

MILLER: Yeh, I guess so - like that -- God damn.

BLYSTONE: It was wild. You should have seen it. You should have seen George give me that f-----, look. He was standing there p-----g. He was standing like this and he was f-----g looking, you know. (inaudible) When I turned him over I thought he was going to (inaudible) boom, boom, boom -- I was ready to go again.

MILLER: You had it loaded up again, huh?

BLYSTONE: I would have man. It was -- I was ready to go -- I swear. Miles, this man is six feet. Jackie said -- when he put his hand like this (inaudible), I said "put your hands on your head." He put them like this and his f-----g hands curled clean down over his knees.

MILLER: He was a big dude?

BLYSTONE: I said "don't you move." I told him -- I said "I'll splatter you all over this f-----g car." He said "I ain't doing nothing." I said "don't you touch the doorknob -- don't touch my girl." I said "don't you take your hands off your legs or I'll waste you" ---- and when I told him "goodbye" ----

MILLER: He didn't try f-----g nothing -- he never tried to get away or nothing?

BLYSTONE: No. I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f-----r ain't going to lay there, but I wanted to warn them -- you know, Jackie and George -- I wanted to warn them that I was going to waste him --- I went back. I went back just expecting this mother-f-----r to be (inaudible) through the fields. I had to laugh.

MILLER: So when you came back to the car you just f-----g said "I'm going to waste the mother-f-----r", and when you went back to him you said "I'm going to waste you" and he didn't ---

BLYSTONE: No, I didn't tell him then.

MILLER: -- f-----g get up or nothing?

BLYSTONE: I didn't tell him then. I didn't tell him I was going to waste him then. I asked him what kind of car he was in and he said "all I know is it was green and it was wrecked in the back." I said "well, goodbye." He tightened up -- tensed up. I think he s--- himself. His whole body went rigid because I was sitting on him.

MILLER: You was sitting on him?

BLYSTONE: Sitting on his back, you know -- had my knees across him, and I told him "well, goodbye," (inaudible) -- the barrel. So I put it to his head and then pulled it off an inch and then I said "goodbye." He went like that, and that's the last move he made and I hit him.

MILLER: He didn't move after that?

BLYSTONE: He never moved.

MILLER: I guess not, man -- f-----g six pieces of lead flying in your f-----g head.

BLYSTONE: Pow, pow, pow, pow, pow, pow. I jumped up, came running back. We went back to the house and Jackie said "what's that on your face" and I said "that a f-----g piece of his brain." She said, "oh, my God, brains." (inaudible) -- and was playing with it and threw it in the ashtray -- had to wipe my face of -- had to take a shower and soak my clothes in cold water. You know that number 12 football jersey I had, the white jersey with the blue shoulders?

MILLER: Yeh.

BLYSTONE: That's the one I killed him in. I think I had these pants on too -- I am not sure. These are jeans. I forget what it was.

MILLER: God damn. You f-----g (inaudible) ---- you just f-----g done it. You don't want none of this milkshake, do you?

BLYSTONE: (inaudible) There ain't nothing to getting away with something, you know. It's very easy. If you'd go ---

MILLER: Wait until I throw this s--- in the back of the truck, man. I am not going to throw it down here. That's f-----g ignorant. I'll give this sandwich to Rover. Remember Rover? I hope it f-----g blows out all them papers and s--- you know.

BLYSTONE: If you know what you are doing, man, you can get away with anything, including murder. It ain't hard at all.

MILLER: God damn.

BLYSTONE: I knew the only way I could get caught is if somebody talked, but nobody's going to talk 'cause I'm going to kill them too.

MILLER: Yeh, no s---.

BLYSTONE: George -- ever since then George has been like ---

MILLER: Ain't you afraid that f-----g George might tell somebody?

BLYSTONE: No, see I told George that I'd waste him too. I said "I'll torture you." I told him I'd blow his f-----g c--- off and everything else if he opens up his mouth. Like (inaudible). He is an accessory to murder. He went back there and touched the body with me, and Jackie's an accessory.

MILLER: Now did he touch it if he was holding the f-----g lighter?

BLYSTONE: He touched him. He was feeling around on the ground and around the body. I didn't want to touch it because of the evidence but I thought that is where the mother-f-----r is. I said "it's under his body." When I took the s--- off of him I threw it on the ground, and then I told him to lay down on the ground, and he got down on his knees and got down. Sure enough it was right there. I rolled him over and it was under his f-----g chest, and I said "we got it -- let's get the f--- out of here. Let's go call the police and then tell them about this body."

MILLER: You didn't call them though?

(BACKGROUND NOISE - INAUDIBLE TO REPORTER)

BLYSTONE: You ain't going to say nothing about this?

MILLER: What the f--- do you think -- even if I did.

(INAUDIBLE TO REPORTER)

MILLER: You know, if I don't find a job pretty soon, man, I'm going to f-----g go steal something.

BLYSTONE: Murder is a real f-----g experience. It's wild. She thinks it's wild.

MILLER: Did she freak out?

BLYSTONE: No, she's all right. She was worried for a few days. I was worried about her losing it, but she wasn't right there when I wasted him.

MILLER: She's still f-----g involved.

AT THIS POINT THE TAPE WAS STOPPED BY THE OFFICER AND ADJUSTED.

JUDGE ADAMS: You may start the tape.

OFFICER STARTS TAPE AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: George never believed me. When I used to say "I'll kill him" he'd look at me like "yeh, sure, okay," but now when I tell George "hey, I'll kill you, he looks at me like "this mother-f-----r is going to kill somebody.

MILLER: He thinks you are for real, ain't it?

BLYSTONE: He thinks I'm for real.

MILLER: That you have the nerve?

BLYSTONE: When I tell him that I'll kill him, it don't mean I'm going to "beat you up or hurt you; it means I'm going to kill you," and Jackie looks at me different, you know.

MILLER: The only thing I'm really f-----d up about, Scott, is ---

BLYSTONE: It don't make you feel bad, Miles. It don't make you feel like an ogre.

MILLER: You don't dream about it or nothing, huh?

BLYSTONE: No. We laugh about it. Miles, it gives you a realization that you can do it, man.

MILLER: And get away with it.

BLYSTONE: You can walk up and ---

MILLER: I hope this ain't your mom.

BLYSTONE: You can walk and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know. Like, I mean I had confidence in myself before because I did it, but Jackie and George - they had doubt in their minds and I said "the mother-f-----r does this, I'm going to kill him," but now when I say it to them ---

MILLER: You just did it to prove it to them?

BLYSTONE: No, it was necessary. The guy could identify us, you know. It proved a point at the same time. He saw my face, Jackie's face, George's face, and he saw the car, you know, and we talked to him for five minutes before I even pulled the gun, and he was looking at us and all this s---.

MILLER: That freaks me out, man, that he didn't even try to get away.

BLYSTONE: He was so scared. When I was searching him, his body was shaking.

MILLER: He acted like he was stupid, man.

BLYSTONE: He might have tried to get away, you know, but like I said, I walked away from him out to where I could walk without making no noise, and I stood there for a minute -- stood there, and I didn't make a sound and he didn't move, man. Then I

made a noise and said "don't think I'm gone." I said "I'm right here. You move and I'll kill you." Then I went back to the car and I said "look, I got to go back there and kill him," and I said "does anybody have any f-----g beefs," --- no, kill him.

MILLER: Everybody said "kill him," huh?

BLYSTONE: Yeh. I ran back to the f-----g guy and bent over him.

MILLER: And George even said "kill him?"

BLYSTONE: Yeh, George said "kill him."

MILLER: God damn.

BLYSTONE: And I f-----g killed him --- got back in the car

MILLER: You think he wouldn't say nothing because he didn't even want to go out with you.

BLYSTONE: He wanted to come. He run his mouth, like I am saying.

MILLER: He didn't want to go the second time?

BLYSTONE: To go back to see the body, yeh, he wanted to, but once he saw the body he realized. I don't know where he thought the blood might have come from -- his brains, or you know, but it didn't him him, and when he was standing there p-----g, Miles, his eyes were like ---

MILLER: Glued on the guy?

BLYSTONE: He'd look at the guy and then look at me -- (inaudible) and then when we lifted him up and George seen (inaudible).

MILLER: He must have had a lot of blood on him, all over his clothes and s---?

BLYSTONE: Right -- blew his eye out -- it was all over him.
 MILLER: You should have took his jacket, man, to keep your
 ass warm (inaudible). I would have if I'd killed so somebody, man
 (inaudible).
 BLYSTONE: (Inaudible), and like I said, the weirdest thing
 was his f-----g eyebrows. It looked like somebody took this f----r
 and beat him with a baseball bat in the face. The concussion, man,
 from them bullets hitting him from the back and then coming up and
 slamming against his skull and cheekbones and s--- and roof of the
 mouth, it looked like something off of a horror movie, -- a mon-
 ster. His eyebrows were out to here, his f-----g cheekbones were
 out to here, his nose was real swollen and part of it was blown off
 -- his teeth were gone. It blew his teeth - you could see his
 teeth sticking in the ground.
 MILLER: Wasn't the wind blowing or anything that night to
 blow the f-----g light out in your lighter?
 BLYSTONE: It didn't blow it out. We both had a lighter. We
 were looking around like we were looking for I.D., but we wasn't.
 MILLER: God damn (inaudible).
 BLYSTONE: I saw the jacket -- Dalton Smithburger -- but
 don't tell nobody because they might be related, you know. A guy
 might blow your f-----g head off for just talking about.
 MILLER: Yeh, I imagine -- no s---.
 BLYSTONE: He lives up in Farmington, I think. He lives up
 on the mountain somewhere -- Farmington, Chalk Hill, or
 Markleysburg.

MILLER: D'd he freak out when he seen you wasn't taking
 him up over the mountain?
 BLYSTONE: Yeh, when I saw him there on that road there I was
 checking him out, you know, and I pulled over and he said "heading
 for the mountain" and I said "hey, we are going up there too" and
 he said "that's good" and I said "but look I need some cash" and he
 said "well, I don't have much money." I pulled off down that road
 and then I said "look, if I go up this mountain I got to have some
 money because I won't be able to get back." I said "I don't mind
 taking you up but ..."
 MILLER: When did you put the f-----g gun on him, man?
 BLYSTONE: I'll tell you. I told him I was going to take him
 up because we were going ourselves, but I said "we got to have a
 way back," and he said "well, I got a few dollars on me," and I
 said "I don't know." He said "I can give you a few for gas" and
 then he started getting in his jacket and then I reached around
 Jackie and I said "put your f-----g hands on the dashboard," and he
 said "oh, oh" and I said "put your f-----g hands on the dashboard."
 I kept telling him, I warned him -- I said "the more you open your
 eyes, the more trouble you are going to be in." He kept f-----g
 trying, man. He kept sneaking looks. He'd see a lightpole coming
 by, you know, through his eyelids, and he would look up and look
 around to see where he was, and I said "mother-f----r, shut your
 f-----g eyes, man." I knew when I pulled the gun I was going to
 kill him (inaudible). He saw the back of the car, you know.
 MILLER: When did he do that?

BLYSTONE: When we picked him up. He came from the back and he could see it was a green Dart with a a f-----g demolished rear end, and that ain't hard to f-----g identify, and I told everybody - I said "look, if I would have killed that mother-f----r, we would be in jail right now." (Inaudible) All the guy had to do -- he didn't have to say it was a Dart or Dodge. All he had to do was to say a green car with a mashed rear-end and they would pick me up as the driver.

MILLER: Yeh, 'cause there ain't none around.

BLYSTONE: Yeh, take me in front of him and he will say "that's the f-----g guy right there - the guy who robbed me," so I told them the only think to do was to f-----g kill him. I said "do you want to end up in jail?" Believe me, if he was alive we'd all be in jail for armed robbery (inaudible). That's why I don't want to f--- around any more. If I think that mother-f----r is going to identify me, or his being alive is going to hope me get caught or if I ain't going to have time to get away, or something, I'm going to kill him. Then I know I can take my time. The next job I am thinking about doing - if I murder this guy, my intention is to dig a grave, but it was getting dark, and you called and Jackie called. I was going to dig one because I am ready to do the job which would help get my house, my apartment, have enough money for Christmas and (inaudible).

MILLER: I wish the f--- you'd have sold me that gun, man. You f-----g blew my job of making ten or twenty bucks.

BLYSTONE: Miles, I can't. It is a f-----g murder weapon, you know.

MILLER: It ain't doing no good out there, man.

BLYSTONE: No, but (inaudible) rather it not be used.

MILLER: Them guns, man -- (inaudible) there is a left twist and there is a right twist, okay?

BLYSTONE: Most is right-twist.

MILLER: How many of them is there around that's got a right twist or a left twist? I mean, God damn, man, how in the hell can they match that up?

BLYSTONE: They have records of those bullets, okay. They did an autopsy on the guy. They have prints of those bullets, okay, in the unsolved crime files. Every time that a .22 is confiscated, they are going to try to match it to who fired it, and they match it. When they match it, whoever has that gun is going to be charged with murder.

MILLER: How in the hell do you know if you got a right twist or a left twist?

BLYSTONE: Most guns have a right-hand twist. Very few guns have a left-hand twist. (Inaudible) have them. Most of them is right, but the bullet is - it really don't matter - right or left-hand twist. More what they look for is rifling grooves: you got (inaudible) grooves plus a firing pin. Every firing pin hits a case at a certain spot, like off-center, to the left, to the right, low or high or (inaudible) takes a certain shape of impression. With an automatic, with a .45 - a lot of people don't know this -- when you chamber a .45 you throw your clip in there - chamber one, and that fires - well, if you fire or whatever, when you eject that f-----g thing, you leave what is called "chamber marks" on your

casing. They can identify -- they can match the gun up with the chamber it came out of with the bullets just by the little scratches and s--- because every chamber puts a different mark on it -- every firing pin puts a different mark (inaudible). A lot of people think "well, I'll change the barrel and they will never know," but they will match the firing pin and the chamber, especially in an automatic. Same thing with bolt rifles. If you had a microscope, you could look, chamber six or seven rounds, jack them out and line them up on a microscope and see if they all match up, scrape marks, everything.

MILLER: So even if they did find that gun -- let's say they did find that God damn gun -- I am getting ready to take off, man.

BLYSTONE: I want to take a s---.

MILLER: Even if they did find the gun -- that's not saying that they can f-----g match it up according to what they say.

BLYSTONE: They can.

MILLER: They can -- how?

BLYSTONE: What they do, they have it on file, man; it is like an x-ray.

MILLER: Inaudible.

BLYSTONE: What they do is when they got a murder, they will take pictures of the bullets.

MILLER: Inaudible.

BLYSTONE: (Inaudible) ---- and every time they find a .22, and they confiscated it for murder, it will go to the unsolved cases (inaudible) with .22's. They are going to go through the .22

unsolved murders and they are going to fire a bullet into those ballistic (inaudible) and all they got to do -- they probably got 20, 30 unsolved .22 murder cases, right -- they just take it and check it, and when they get one, you are --- (inaudible).

MILLER: I'm going to take off, man (inaudible) -- I don't know whether it does any good whether I go home or not, man. I go home and she's (inaudible) and I go to Frank's, you know what I mean, because she is always there. Either she is there, or I go there and Frank and them tell me that she just left, and I know they are lying, you know what I mean - I know they are lying because I'll sit up the road sometimes and smoke a cigarette because I figure that I'm going to go home and she is not going to be there, and then tell me bull-s--- like that, and guaranteed, man, I've stood up the road and smoked a cigarette. Didn't you see her? Bull-s---; that's bull-s--- man.

AT THIS POINT THE OFFICER TURNS OFF THE TAPE.

[J-33-1988]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 37 W.D. Appeal Dkt. 1986
:
Appellee : Appeal from the Judgments of
: Sentence of the Court of
: Common Pleas of Fayette County,
v. : Criminal Division, at Nos. 2,
: 2 1/4, 2 2/4 & 2 3/4 of 1984
: entered on April 17, 1986
:
SCOTT WAYNE BLYSTONE, :
Appellant : ARGUED: March 9, 1987
: REARGUED: March 7, 1988

DISSENTING OPINION

JUSTICE ZAPPALA

FILED: OCTOBER 17, 1988

Because I disagree with the majority opinion's conclusion regarding the constitutionality of the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 et. seq., I must dissent.

Since the majority sets forth the actual provisions of the Act, it is only necessary to summarize the Act. Under the Act, with the consent of a participating individual, the government may electronically eavesdrop upon a person using a body tap upon the approval of the Attorney General, the District Attorney or their enumerated authorized agents. Noticeably missing from the Act is a requirement that a disinterested judicial officer review the facts to ascertain whether probable cause exists for the intercept. It is the failure to provide for the later requirement which causes me to conclude that this part of the Act is unconstitutional. The consensual interception

authorized by § 5704 amounts to a search and seizure requiring either a warrant or probable cause as required by Article I, section 8 of our Constitution.

There is no question that the interception of an oral communication is considered a "search and seizure" as those terms are constitutionally defined under both the federal and state constitutions. See, Katz v. U.S., 389 U.S. 349, 19 L.Ed.2d 576, 88 S. Ct. 507 (1967); Commonwealth v. White, 459 Pa. 84, 327 A.2d 40 (1974). As the majority correctly points out, in interpreting the Fourth Amendment's protection against unreasonable searches and seizures, the United States Supreme Court has taken the approach that one party consensual interceptions do not violate that provision since an accused waives his "expectation of privacy" by conversing with another party. In short, the United States Supreme Court and the majority can discern no difference between communicating with the police informant who in turn reports to the police and surreptitiously recording the conversations directly by interception. This analysis embodies the proposition that the key factor to be considered in a wire intercept is whether the individual has a "legitimate expectation of privacy" and whether he has waived that expectation by disclosing information to any other party. While on the surface the majority's reliance upon the federal court's position seems to have merit, closer analysis reveals that blind adherence to this proposition is erroneous.

[J-33-1988] -2

In its rush to adopt federal jurisprudence to support its position, the majority merely pays lip service to the admonitions of Mr. Justice Brennan of the United States Supreme Court which we heeded and embraced in Commonwealth v. Sell, 504 Pa. 46, 49, 470 A.2d 457, 459 (1983):

[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

In refusing to adopt the United States Supreme Court abolition of "automatic standing" under the Fourth Amendment of the Federal Constitution in Sell, we reaffirmed our prior holding that the:

state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the right so guaranteed may be more expansive than their federal counterparts. (Citations omitted)

Commonwealth v. Tate, 495 Pa. 158, 169, 432 A.2d 1382, 1387 (1981). In Sell, we then analyzed the federal case law limiting standing under the Fourth Amendment against the evolution of protected liberties guaranteed by Article I, section 8 of our own

constitution and had no problem in rejecting the federal analysis of "automatic standing" under our comparable constitutional clause.

It is also important to note that in Commonwealth v. Sell, supra, we upheld the overriding importance of "privacy" under our constitution:

In construing Article I, section 8, we find it highly significant that the language employed in that provision does not vary in any significant respect from the words of its counterpart in our first constitution. The text of Article I, section 8 thus provides no basis for the conclusion that the philosophy and purpose it embodies today differs from those which first prompted the Commonwealth to guarantee protection from unreasonable governmental intrusion. Rather, the survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.

504 Pa. 65, 470 A.2d 467. Thus, unlike our federal counterparts, the right to privacy has been elevated to a paramount right guaranteed to every citizen of this Commonwealth. This paramount status was even acknowledged by the legislature in defining an "oral communication" under the Act.

"Oral communication." Any oral communications uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.

18 Pa.C.S. § 5701. If a person has a legitimate expectation of privacy, that paramount right should not be infringed upon without a corresponding justification."

Both the majority and the United States Supreme Court adhere to the view that a "person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversations to the police." (Citations omitted) (Slip Opinion, p. 12). The majority adopts the federal rationale without offering any persuasive argument for doing so. Under the majority view, a person could never be sure of having a confidential conversation with another. Communicating in and of itself would waive any right of privacy. As is evident, such an approach has a chilling effect, relegating the right of privacy to nothing more than a useless ideal which could only be exercised when one is alone.

I find comfort and support for my position in this appeal from a recently decided decision of the Supreme Court of Oregon. See State of Oregon v. Roger Jonathan Scott Campbell, 306 Ore. 157; 1988 Ore. LEXIS 400 (filed July 12, 1988); Accord, Commonwealth v. Blood, 400 Mass. 61; 507 NE2d 1029 (1987) (Similar Massachusetts interception statute held unconstitutional as being unreasonably intrusive to impose risk of electronic surveillance on every act of speaking aloud to another person). In Campbell, the court was faced with the question of whether or not under its state constitution, police use of a radio

transmitter to locate a private automobile to which the transmitter had been surreptitiously attached is a "search or seizure". In rejecting the state's argument that the court should embrace the decisions of the United States Supreme Court which validated such a use, the court boldly disassociated itself from the United States Supreme Court's decisions allowing such a monitoring, United States v. Knott, 460 U.S. 276, 103 S. Ct. 1081, 75 L.Ed.2d 55 (1983), and United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L.Ed.2d 530 (1984) because the United States Supreme Court's interpretation in those cases did not comport with the interpretations of the Oregon Supreme Court regarding search and seizure and privacy protection as set forth in Article I, § 9 of the Oregon Constitution. After finding that privacy is an interest protected by Article I, § 9 of its state constitution the court discussed blind adherence to federal jurisprudence.

Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional provisions, or opinions of legal commentators. What is persuasive is the reasoning, not the fact that the opinion reaches a particular result. (Emphasis supplied)

Oregon v. Campbell, 1988 Ore. LEXIS 400 at p. 6.

After a thorough review resulting in the rejection of the United States Supreme Court's reliance on reasonable

expectation of privacy analysis, the Oregon Court considered the argument that information legitimately available through one means may be obtained through any other means without engaging in a search. In the court's poignant rejection of that premise it determined that:

[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or "private", secret from the government. (Citations omitted) What the provisions forbid are unreasonable searches and seizures, i.e., certain acts of the government. Article I, section 9 "presents the police with a web of rules that are meant to protect the privacy interests of 'the people', and the police violate section 9 if and only if they violate these rules. State v. Tanner, 304 Ore. at 320. Whether police conduct is a search does not turn on whether its object could be discovered by conduct that is not a search. For example, in State v. Lewis, *supra*, the defendant exposed himself to public view through his living room. This Court held that the police officers did not engage in a search by photographing him from a house across the street with a 135 m.m. camera lense, which provided only minimal enhancement of what could be observed with the unaided eye. Nonetheless, the police officers would have engaged in a search had they entered his living room to observe what could be observed from the street. Similarly, if an undercover police officer is invited into a home and observes illegal conduct, the officer has not committed a search, but an unconsented entry into the home by other police officers to observe what the undercover officer could or did not observe would be a search. The issue is not whether what the police learned by using the transmitter in this case was "exposed to public view", but whether using the transmitter is an action that can be characterized as a search.

...

The problem presented by this case is essentially much like that presented in Katz, which was whether using a hidden listening device placed in a public place could be considered a search. Conversations in public may be overheard, but it is relatively easy to avoid such eavesdroppers by lowering the voice or moving away. Moreover, one can be reasonably sure of whether one will be overheard. But if the state's position in this case is correct, no movement, no location and no conversation in a "public place" would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation on personal freedom. We could not be faithful to the principles underlying Article I, section 9 and conclude that such forms of surveillance were not searches.

Id. at p. 12.

Even accepting *arguendo*, the majority's logic regarding the expectation of privacy, I am perplexed as to why a conversation between two nonconsenting persons is entitled to all the protections embodied in the federal amendment while a conversation with one consenting to eavesdropping does not. If the key element is the expectation of privacy, then the consent of one participant is insufficient. Unlike the majority, I fail to see the distinction between having the consent of one participant or none as the polestar in guaranteeing a fundamental right. Furthermore, I cannot accept the majority's conclusion that one who communicates to another does so at the expense of his privacy rights. Implicit in the right to privacy is the

right to determine who benefits from your knowledge. Knowledge is as much a possessory right as the right to possess and protect our homes and personal property. An individual then may desire not to expose his inner thoughts or ideals to the public at large which he may not trust, but only to selected individuals. Of course, he takes the risk that a friend may betray him and his confidences, but that risk is one that he individually and knowingly assumes. Under such circumstances, he voluntarily chooses to limit his privacy.

Finally, taking the majority's reasoning to its logical extreme, if there is no difference between directly intercepting oral communications and receiving and recording information from an informant, then there will be no difference in directly probing and tapping the innermost thoughts of individuals in the future with the advent of more sophisticated electronic equipment. If the ends justify the means and the goal is to prevent criminal activity at the expense of individual liberties, then, under the majority's interpretation, I see no way to prevent intercepting thoughts even before they are orally and publically communicated.

Accepting the importance of the right to privacy, as the majority must, the issue still becomes whether the governmental intrusion is reasonable, not whether an individual possesses an expectation of privacy. We have specifically rejected the United States Supreme Court's analysis of the

legitimacy of privacy as a key element in interpreting Article I, section 8 of this Commonwealth's Constitution. Instead, we have held that our primary concern is the reasonableness of the intrusion. Commonwealth v. Sell, supra.

In other areas of criminal law we have consistently held that a warrantless search or a search pursuant to a warrant must be based upon probable cause. To ensure an objective determination of whether the intrusion is supported by probable cause, we have required a disinterested judicial officer to review the facts either preliminarily, in the case of a search pursuant to a warrant, or subsequently, in the case of a warrantless search, to determine if sufficient facts were present to establish probable cause that criminal activity was occurring. This neutral determination suffices to protect a person from an unjustifiable intrusion. Under § 5704(2)(ii), however, the legislature has impermissibly taken the "probable cause" determination from the judiciary and given that determination to a law enforcement official who cannot be said to be either neutral or detached. In Commonwealth v. Johnston, 515 Pa. 454, 530 A.2d 74 (1987), we specifically rejected the approach now taken by the majority in balancing the individual and governmental interests to be protected in determining whether a search was reasonable. Instead, we held that a determination that probable cause existed for the search supported a finding that the search was reasonable. Without such a neutral determination the search would be unreasonable.

Based upon the foregoing analysis, I cannot accept the constitutionality of § 5704 of the Act. I am cognizant of the principles that a statute is presumed to be constitutional and that the legislature does not intend to promulgate unconstitutional legislation. 1 Pa.C.S. §1922(3). However, when a statute so blatantly ignores a liberty entrenched in our body of laws for over 200 years, that presumption must necessarily fall. Unlike the Superior Court's approach in Commonwealth v. Schaeffer, ___ Pa. Super. ___, 536 A.2d 354 (1987), I cannot in good conscience redraft the statute to include a requirement so basic to our system of justice to achieve a desired result. See 1 Pa.C.S. § 1921(b). It is clear to me that given the importance of the right to privacy in our jurisprudence, as even acknowledged by the legislature in this Act, I cannot conclude otherwise than that the legislature did not intend for a disinterested objective determination of probable cause prior to intercepting oral communications. See 1 Pa.C.S. § 1921(a). Therefore, I would find Section 5704 unconstitutional and remand this matter to the trial court for a new trial during which the information obtained pursuant to the Act would be suppressed.¹

Mr. Justice Larsen joins in this dissenting opinion.

1. President Judge Cirillo of the Superior Court has written a rather lengthy and scholarly opinion on this issue in Commonwealth v. Schaeffer, *supra*. Except for his reasoning on the constitutionality of § 5704 of the Act, I note with approval his analysis of the issue and would incorporate his opinion into this one.

COMMONWEALTH,

vs.

SCOTT WAYNE BLYSTONE,
Defendant.

: IN THE COURT OF COMMON PLEAS OF
: FAYETTE COUNTY, PENNSYLVANIA
: CRIMINAL DIVISION

: NOS. 2 of 1984, 2 1/4 of 1984,
: 2 2/4 of 1984, and 2 3/4 of
: 1984

OPINION

ADAMS, J.

A Fayette County Criminal Court Jury found the defendant, Scott Wayne Blystone, guilty of the charges of murder in the first degree, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery.

Following the sentencing hearing, the jury unanimously sentenced the defendant to death.

Jeffrey W. Whiteko, trial counsel for the defendant, (hereafter referred to in this opinion as "trial counsel"), timely filed a motion for a new trial and motion in arrest of judgment.

Subsequently, the defendant maintained that trial counsel was ineffective at trial. Trial counsel, with the consent of the defendant, was permitted to withdraw, and the court, with the approval of the defendant, appointed Samuel J. Davis (hereafter referred to in this opinion as "post-trial counsel") to represent the defendant on all issues raised by the defendant, including ineffectiveness of trial counsel.

Trial counsel in his motion for new trial and motion in arrest of judgment alleged the following:

1. The trial judge erred in denying the defendant's motion to suppress communications and evidence since the

Commonwealth failed to establish probable cause to permit the wiretapping of defendant's conversation.

2. The District Attorney should not have permitted the wiretapping of defendant's conversation since it was not demonstrated that the informant was reliable.

3. The Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitution.

4. The District Attorney's Office should not have been permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

5. The defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

6. The informant's consent was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

7. The trial judge erred in not sequestering those jurors selected during voir dire since the case was highly publicized in the media.

8. The trial judge erred in not sequestering the jury during the trial because of the adverse trial publicity. Said adverse publicity was highly prejudicial against the defendant during his trial.

9. The publicity brought forth by the media during defendant's trial was highly prejudicial against the defendant.

10. The publicity concerning the trial of a co-defendant was highly prejudicial to the defendant.

11. The defendant's case was prejudiced when Commonwealth witness, Neil Christopher, referred to the .22 caliber handgun as the "murder weapon."

12. The defendant's case was highly prejudiced when Commonwealth witness, Jacqueline Guthrie, twice referred to defendant's criminal record.

13. The trial judge erred in permitting the Commonwealth to introduce into evidence a .22 caliber handgun since it failed to establish a chain of custody.

14. The verdict was against the weight of the evidence since the testimony of Jacqueline Guthrie and Barbara Clark were contradictory.

15. The verdict was against the weight of the evidence since the Commonwealth failed to prove the identity of the voice on the tape beyond a reasonable doubt.

16. The trial judge erred in permitting the media to stand directly behind the jurors during the playing of a tape.

17. A juror should not be challenged peremptorily by the Commonwealth simply because that juror is against the death penalty.

18. The death penalty is unconstitutional because it constitutes cruel and unusual punishment under the Eighth Amendment.

19. The trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances, although the defendant was against such a decision.

Defendant's post-trial counsel filed supplemental motions for new trial and motions in arrest of judgment setting forth the following reasons:

1. That the present situation does not present circumstances in which the death penalty is appropriate, and its imposition shocks one's sense of justice, and said death penalty should be overruled by the trial court and a term of life imprisonment imposed.

2. That the defendant's right to a jury consisting of a fair cross-section of the community, as guaranteed by the United States and Pennsylvania Constitutions, was denied because the trial court allowed the prosecution to challenge for cause those potential jurors who had conscientious, moral or religious reservations about imposing the death penalty.

3. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to use a peremptory strike to eliminate the juror, Battaglini, from the jury after the defendant's challenge for cause as to said juror was denied.

4. That the jury's verdict of guilty on the robbery charge was against the evidence and the weight of the evidence in that insufficient evidence was presented regarding the taking of any of the victim's property.

5. The trial judge erred in failing to instruct the jury specifically that the corpus delicti of the crime of robbery must be made out by independent evidence aside from the defendant's admissions or confessions concerning said offense.

6. That the defendant was denied his right to effective assistance of counsel in that his trial counsel failed to object

to the charge of the Court which neglected to clearly state the corpus delicti requirement for the charge of robbery.

7. That the evidence adduced at trial did not sufficiently prove the corpus delicti of the crime of robbery. Specifically, there was a lack of independent and substantial evidence concerning any theft of the victim's property.

8. That since the verdict of guilty on the robbery charge returned by the jury was erroneous, then the death penalty was improperly imposed by the jury in that the robbery formed the sole aggravating circumstance found by the jury.

9. That the defendant was denied his right to effective assistance of counsel in that his trial counsel disregarded his specific instructions regarding the questioning of the prosecution witness, Jacquelin Guthrie.

10. That the defendant was denied effective assistance of counsel by trial counsel's failure to make a motion in limine to require the Court and prosecutor to caution all prosecution witnesses to avoid any mention of the defendant's prior record. Said failure resulted in three instances in which prosecution witnesses mentioned or implied that the defendant had been involved in prior criminal activity.

11. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's rights to privacy and self-incrimination guaranteed him by Article I, Section 8, of the Pennsylvania Constitution.

12. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's

rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I - Section 1 of the Pennsylvania Constitution, and his right to be heard in a criminal prosecution secured by Article I, Section 9, of the Pennsylvania Constitution.

13. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to attempt to rehabilitate jurors who expressed reservations concerning the imposition of the death penalty.

14. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to call any alibi witnesses on his behalf, despite his knowledge of the same.

15. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to properly investigate the existence and possible testimony of the defendant's alibi witnesses.

16. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to object and request a cautionary instruction when a witness mentioned or implied the existence of the defendant's prior criminal record.

17. That the defendant was denied his constitutional right to a fair trial by the three references by two separate witnesses which mentioned or implied the existence of the defendant's prior criminal record. In addition, the defendant was denied his right to effective assistance of counsel by trial counsel's failure to move for a mistrial when the references to the defendant's prior criminal record were elicited before the jury.

18. That the trial judge erred in allowing the victim's father to testify concerning the victim's character, intelligence, and propensity to follow orders. Said testimony was irrelevant or in the alternative was so highly prejudicial to the defendant as to outweigh its slight relevance.

19. That the aggravating circumstance on which the jury based its death sentence finding is unconstitutional in that it is over-broad and bears no reasonable relationship to the determination of the appropriate penalty for defendant's conviction of first degree murder.

20. That the three references by two Commonwealth witnesses to the defendant's criminal record improperly tainted the death sentence determination by the jury.

21. That the trial court erred in denying the defendant's motion for an evidentiary hearing to present testimony concerning the prosecution proneness of the jury that convicted him.

22. That the defendant was denied his constitutional right to effective assistance of counsel by his trial counsel's failure to raise any prosecution proneness objections at pretrial or during the trial of the case.

A hearing was held April 12, 1985 on the allegations of ineffectiveness of trial counsel. Several areas of ineffectiveness of trial counsel, not specifically enumerated in defendant's supplemental motion for new trial and motion in arrest of judgment were also raised.

The court will deal with each allegation and, where appropriate, combine those issues that are related.

1. THE VERDICTS OF GUILTY OF MURDER IN THE FIRST DEGREE WITH THE IMPOSITION OF THE DEATH PENALTY, ROBBERY, CONSPIRACY TO COMMIT MURDER, AND CONSPIRACY TO COMMIT ROBBERY WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The test of the sufficiency of the evidence is whether, after the Court has reviewed all of the evidence in the light most favorable to the Commonwealth and has drawn all reasonable inferences therefrom in favor of the Commonwealth, the evidence is sufficient in law to enable a jury to find each and every element of the crimes charged beyond a reasonable doubt.

Commonwealth vs. Carter, 329 Pa. Super. 490, 495, 496, 478 A.2d 1286, 1288 (1984); Commonwealth vs. Nelson, 320 Pa. Super. 488, 491, 467 A.2d 638, 640 (1983).

A new trial will be granted on the grounds that the verdict is against the weight of the evidence only where the verdict is so contrary to the evidence as to shock one's sense of justice. Commonwealth vs. Jensch, 322 Pa. Super. 304, 313, 469 A.2d 632, 637 (1983).

Whether to grant a new trial for this reason is committed to the sound discretion of the trial court. Commonwealth vs. Pronkoskie, 498 Pa. 245, 251, 445 A.2d 1203, 1206 (1982); Commonwealth vs. Jensch, supra, at 313, 469 A.2d at 636.

Applying this standard, the Commonwealth established that on the evening of September 9, 1983 between the hours of

approximately 6:00 p.m. on that date and 2:00 or 3:00 in the morning of September 10, 1983 the defendant, Scott Wayne Blystone, was in the company of Jacqueline Guthrie, Barbara Clark, and George Powell (hereinafter in this opinion Scott Wayne Blystone will be referred to as "Blystone," Jacqueline Guthrie as "Guthrie," Barbara Clark as "Clark," and George Powell as "Powell").

The group remained together during the time stated herein and at one point stopped for sandwiches at the "AM-PM Mini-Mart" situate in the City of Uniontown. After leaving the "AM-PM Mini-Mart," they drove east from Uniontown on Route 40 to Hopwood.

At approximately 12:00 midnight, as they approached the area of the "Pizza Hut" situate in Hopwood, Blystone observed a young man hitchhiking. The Commonwealth established that the hitchhiker was Dalton Charles Smithburger (hereinafter in this opinion referred to as "Smithburger").

Blystone said "I am going to pick this guy up and rob him, okay, Barbie?" (TT 5-B) Barbie said "yeh, okay, go ahead, I don't care," and Powell said "yeh, it's cool." (TT - 6-B) Blystone stopped the car and asked Smithburger if he wanted a ride. Smithburger was not known by any of the parties but was described as "tall with dark hair and wearing a light blue suit and black shoes."

Blystone asked Smithburger if he had any money, to which he replied that he only had three dollars.

Blystone turned off Route 40 toward Little Brownfield. He then pulled a gun which he had been carrying all evening and pointed it to Smithburger's head. Blystone ordered Smithburger to close his eyes, put his hands on the dashboard and look ahead. Smithburger complied. Smithburger then opened his eyes. Blystone started to yell at him. He said "I told you once, you mother f'er, if you don't keep your f'n eyes closed I will blow your f'n brains out." (TT - 7-B)

Blystone again asked Smithburger how much money he had and again Smithburger stated that he had three dollars. Blystone told Smithburger "you are only going to lose your money, not your life." (TT - 8-B)

When they arrived at the Little Brownfield area, Blystone got out of the car, walked around the car, took Smithburger out of the car, and walked with him into a nearby field. Blystone returned in five minutes without Smithburger. He asked what he should do "kill the boy or what because he can identify us." (TT - 9-B). Guthrie shrugged her shoulders and Powell said "do what you have to do." (TT - 10-B)

Blystone left the car and shortly thereafter six shots were heard. The time was approximately 12:30 a.m. When Blystone returned, he said "it was thrilling." (TT-10-B)

Blystone then drove to the "Hi-To Gun Club," where he stopped and told Clark, Guthrie and Powell that he would kill all of them if they told. (TT - 11-B) From there they proceeded to Powell's apartment where Blystone laid money on the stand and said that he had gotten "\$13.00 from the boy." (TT - 12-B)

At this time Blystone described what had happened. Blystone said he made Smithburger lie face down and that before he shot him he asked him what kind of car he was in, and Smithburger said all he knew was that he was in a green car and it was smashed in the back -- in the rear -- and then he said "bye-bye" and then shot him. (TT - 12-B)

The Commonwealth further established that sometime around the 12th of December, 1983, Miles Miller (hereafter in this opinion called "Miller") contacted the Pennsylvania State Police stating that he had received information from Powell that Blystone had killed a man in Brownfield and had taken \$13.00 from him. Powell told Miller that he, Blystone, Guthrie, and Clark were present when the killing occurred.

On December 15, 1983, District Attorney Gerald R. Solomon met with Miller, Sergeant George R. Fayock of the Pennsylvania State Police, Trooper Roy Fuller of the Pennsylvania State Police, Trooper Robert V. Teagarden of the Pennsylvania State Police, and Assistant District Attorney Ralph C. Warman.

After reviewing the State Police file, Mr. Solomon and Mr. Warman met privately with Miller. Miller related the same information to the District Attorney and Assistant District Attorney that he had previously related to the State Police concerning the information he had received from Powell relating to the homicide.

Miller voluntarily agreed to have a body wire placed on his person without any promise, threat or coercion, and on

December 12, 1983, executed a memorandum of consent to be wired. The District Attorney executed a memorandum of approval as required by the Act.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately fifteen years, specializing in undercover work and electronic surveillance work, had an A-Certification for electronic surveillance and wiretapping which authorized him to monitor the conversations where one party had consented to have the conversations intercepted and recorded.

An electronic recording device was placed on Miller by Trooper Teagarden, which received and electronically recorded the conversations.

In addition, there was a transmitter placed on Miller which transmitted conversation with Blystone to a recording device in a van of the police officer that would receive and record the conversation.

Miller met with Blystone and their conversation concerning the homicide was recorded.

The conversation of Blystone and Miller is as follows:
"BLYSTONE: Do you remember the body they found along the road next to the "Redhead" -- along Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger -- found him laying in a field shot six times.

MILLER: I don't read the fucking paper.

BLYSTONE: Shot six times in the head.

MILLER: Six times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-bitch, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what -- go to the library.

MILLER: I am not going to no fucking library.

BLYSTONE: Me and Jackie -- you got to keep this quiet -- we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of shit and that wasn't working so I said 'fuck it - I'm going to just drive up and blow somebody's brains out and take their wallet.' George was with us. Don't burn me.

MILLER: You think I'm going to fucking go to the state cops, man, and tell them 'hey, look, and all this and that, I know this Scott Blystone.'

BLYSTONE: Don't even tell Jackie that I told you this or she'll fucking flip." (TT - 100 - 101)

The recorded statement further revealed that Blystone stated he picked up Smithburger in Hopwood along Route 40. He knew what he was going to do and he told everybody what he was going to do. He told Smithburger that in order to go up the mountain where

Smithburger wanted to go that Blystone needed gas money.

Smithburger said "well, I got a little bit." (TT - 102)

This "ticked" the defendant off when he said "I can only give you a few dollars," (TT - 102) so he pulled out the gun and put it to Smithburger's head. Blystone told Smithburger "get your fucking hands on the dashboard." (TT - 103) Smithburger started to reach in his coat. Blystone said that Smithburger didn't have a gun, but he thought he did and that he almost splattered him right there. (TT - 103)

Blystone took Smithburger out of the car at gunpoint and took him into a field. He found \$13.00 on him. He took the money from Smithburger and told him to "lay down" and "you wait right here. I'll be right back. Don't move or I'll blow your fucking brains out." (TT - 104) Smithburger said "I ain't going nowhere." (TT - 104)

Blystone returned to the car and told Guthrie, Clark and Powell that Smithburger could identify him. Blystone said "I got to kill him. Can everybody handle it?" Everybody said "yeh, go ahead, kill him." Blystone went back to Smithburger and asked him what kind of car picked him up. Smithburger replied "all I know is it was green and the back end was wrecked." (TT - 105) "I said 'goodbye,' and he tightened up and I fucking wasted him. Blood splattered all over me. I shot him six times. You should have heard it, man. Pow, pow, pow, pow, pow, pow. Brains started oozing out of this fuck. Every hole I put in his head, brains would start oozing out each time I shot him. I found brains on my nose. Jackie picked them off my face that

night." (TT -105)

Blystone and the others went back to Powell's house for about two hours. While there Blystone realized that he had handled a cigarette pack with his bare hands, so they went back to the site. Blystone told Powell "I'll take you over to the body." In the event anyone was observing Blystone and Powell, they pretended to accidentally discover the body.

Blystone said to Powell "look, man, it is a fucking body," and they walked over. George put the light on this guy. "I grabbed him by his fucking coat, pulled him up - moved him up - and, man, he was nothing but a pool of blood. One eye was out and his fucking eyebrows -- his whole brow, man, was like real swollen -- looked like somebody had beat him with a baseball bat -- cheeks were all swollen. There was holes in them and coming out his throat and, shit, his teeth were in the ground. They were blown in the ground." (TT - page 107)

Blystone stated that nothing ever happened and it was an unsolved murder. He stated that it was easy to kill someone and get away with it. He further stated, "murder is a real fucking experience. It's wild." (TT - 113) He boasted, "George never believed me. When I used to say 'I'll kill him,' he'd look at me like 'yeh, sure, okay,' but now when I tell George 'hey, I'll kill you,' he looks at me like 'this motherfucker is going to kill somebody.'" (TT - 114) "When I tell him that I'll kill him, it don't mean I'm going to 'beat you up or hurt you; it means I'm going to kill you.'" (TT - 114) "And Jackie looks at me different, you know." (TT - 114).

Blystone further stated "it don't make you feel bad, Miles. It don't make you feel like an ogre," and in response to a question from Miller, "you don't dream about it or nothing, huh?", Blystone replied "no, we laugh about it. Miles, it gives you a realization that you can do it, man. You can walk up and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know." (TT - 114)

Miller identified the voice on the tape as that of Blystone, and also testified as to what Blystone had told him as to the murder of Smithburger. Miller's testimony in court was totally consistent with that which was presented on the tape (although not in as much detail).

The testimony of Guthrie and Clark was corroborated by the testimony of Arthur Richard Evans, a bartender at the "Hopwood Tavern" in Hopwood, Pennsylvania, that Dalton Charles Smithburger, who was known to Mr. Evans, left the tavern on the evening of September 9, 1983 at approximately 11:30. At that time Smithburger took with him a quart bottle of beer in a paper-bag. (TT - 5)

Gina Marie Mathieson testified that she saw the victim in the "Pizza Hut Restaurant" in Hopwood around midnight. She described Smithburger and stated that he left the "Pizza Hut" carrying a Pepsi-Cola in a papercup, and that she saw him walk in the direction of Route 40. (TT - 7)

Judith Menner, who lives near Brownfield close to the point where Smithburger's body was found, testified that she heard gunshots at approximately 12:30 a.m. on the morning of September 10, 1983. (TT - 9)

Dr. Manuel Pelaez, the pathologist, performed an autopsy on Smithburger which revealed six gunshot wounds in the back of the head of Smithburger which, according to the pathologist, was the cause of his death. (TT - 20)

Smithburger was killed with a .22 caliber handgun. Blystone was carrying a .22 caliber handgun on the night of the killing.

Blystone elected to remain silent and did not testify nor offer any evidence during the trial of the case, and he elected to remain silent and did not offer any testimony during the sentencing phase of the trial.

During the sentencing phase of the trial he refused to permit trial counsel to call any witnesses on his behalf despite the efforts of his trial counsel and the court to encourage him to do so.

The court will discuss each of the verdicts of guilty in turn.

2. WAS THE VERDICT OF MURDER IN THE FIRST DEGREE AGAINST THE WEIGHT OF THE EVIDENCE?

Under the Pennsylvania Crimes Code, 18 P.S.C.A., Section 2502(a), the definition of murder in the first degree is as follows:

"Criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

An intentional killing is defined under (d) of the section as follows: "Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing."

Clearly the evidence presented by the Commonwealth would enable the jury to find beyond any reasonable doubt that Blystone killed Smithburger by shooting him six times in the back of the head during the commission of the crime of robbery, and that he did so willfully, deliberately, and with premeditation and with malice.

Blystone's purpose in picking up Smithburger was to rob him. He announced his intention to do so and did in fact rob him.

Thereafter, because Blystone was fearful that Smithburger might identify him and other occupants of the car, he announced his intention to kill Smithburger and did so by firing six shots into the back of his head.

The Commonwealth's case was established by eye witnesses who were present and who testified as to events leading up to the robbery, and upon recorded statements of Blystone as to his role in the murder, as previously set forth in this opinion.

There is no question in this court's mind that the Commonwealth produced evidence beyond a reasonable doubt which would justify the finding of the jury that he was guilty of murder in the first degree.

3. WAS THE VERDICT OF ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?

Blystone maintains that the jury's verdict on the robbery charge was against the weight of the evidence for the following reasons: Insufficient evidence was presented with regard to the taking of any of Smithburger's property; no corpus delicti of the crime of robbery was made out; and it was improper to introduce Blystone's admissions or conversations that he did in fact rob the victim since no corpus delicti of the crime of robbery had been proven.

Under the Crimes Code, robbery is defined as follows:

- "(1) A person is guilty of robbery if, in the course of committing a theft he
 - (i) inflicts serious bodily injury upon another;
 - (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
 - (iii) commits or threatens immediately to commit any felony of the first or second degree;
 - (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
 - (v) physically takes or removes property from the person of another by force however slight.
 - (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission."
- 18 Pa. Cons. Stat. Ann., Section 3701

We would first note that, contrary to Blystone's contention, it is not necessary, in order to convict of the crime of robbery, that the Commonwealth must prove beyond a reasonable doubt that anything was in fact taken from the victim. The statute provides:

"An act shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft." 18 Pa. Cons. Stat. Ann., Section 3701

It is well settled that before the Commonwealth may introduce a confession or admission of guilt made by the accused, it must be first established by independent evidence that a crime has been committed. Commonwealth vs. Fried, 327 Pa. Super. 234, 239, 475 A.2d 773, 775 (1984) (citing numerous cases supporting this proposition). However, while the corpus delecti rule requires that the Commonwealth establish through independent evidence that a crime has occurred before the admission of the accused may be admitted into evidence, it does not require that the corpus delecti of the crime be proven beyond a reasonable doubt.

Commonwealth vs. Byrd, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980).

The preliminary burden of proof by the Commonwealth is slight, and it is for the trial judge to decide when the Commonwealth has sustained its burden establishing the corpus delecti. Once the trial judge has done so, the Commonwealth may admit the statements and admissions of the defendant to meet the ultimate burden of proof beyond a reasonable doubt that the defendant has committed the crime, in this case the crime of robbery.

Blystone was charged with homicide as well as the crime of robbery. The Commonwealth established the corpus delecti of homicide when testimony was introduced to show that Smithburger was found dead in an isolated area where he had been taken by Blystone at gunpoint, having been shot in the head six times. Once these facts had been established by the Commonwealth, the admission of Blystone that he had committed the murder are

admissible to prove the crime of murder, and his statement that he murdered Smithburger during the course of the robbery so that the victim could not identify him is also admissible to show motive, intent, malice, and that the murder was committed in the course of committing a felony.

Blystone is not challenging the admissibility of his statements on the charge of homicide,¹ but maintains that although the statements are admissible to prove homicide, his statement that he committed a robbery is not admissible unless independent of the homicide the Commonwealth is able to establish a corpus delecti of robbery. This is an interesting argument but this Court rejects it.

Once the Commonwealth makes out a corpus delecti of the homicide, the statement of a defendant that he killed the victim in the course of a robbery is admissible not only to show that he did kill the victim but also that he did so while in the course of a robbery.

It is not necessary to prove independent of the confession that the death occurred during a felony. Commonwealth vs. Weeden, 457 Pa. 436, 444, 322 A.2d 343, 348 (1974); Commonwealth vs. Leamer, 449 Pa. 76, 83-84, 295 A.2d 272, 275 (1972). Com. vs. Coley, ___ Pa. Super. ___, ___, 504 A.2d 1286, 1290 (1986).

Further, the crimes of murder and robbery arose from a single transaction and had in common the killing of Smithburger.

¹ Blystone is however challenging the use of the statement that Blystone robbed the victim to establish an aggravating circumstance justifying the imposition of the death penalty as will be discussed later on in this opinion. Blystone also seeks to suppress his taped statements.

Thus Blystone's statement describing the single criminal incident during which both of the crimes occurred was admissible as to both once the corpus delicti of murder was established.

Commonwealth vs. Steward, 263 Pa. Super. 191, 197, 397 A.2d 812, 814 (1979).

In any event, there was ample evidence presented by the Commonwealth to establish a corpus delicti of a robbery.

The evidence of the Commonwealth established, independent of all the statements of Blystone, that he robbed Smithburger. Blystone observed Smithburger standing along Route 40. He picked him up and inquired of him as to whether he had any money. Blystone became irritated when Smithburger told him he only had three dollars. Blystone then pulled a gun, placed it to Smithburger's head, told him to shut his eyes and place his hands on the dashboard, and told him that he was only going to lose his money, not his life. He then drove the car to an isolated area, removed the victim from the car at gunpoint, took him into an open field, and six shots were heard. Blystone returned without Smithburger and subsequently showed his companions thirteen dollars that he did not have prior to picking up Smithburger. This establishes a corpus delicti of robbery beyond a reasonable doubt, at which time the statements of Blystone are admissible on the issue of robbery. These statements established in detail that Blystone intended to find a person to rob, that he made a statement prior to picking up Smithburger that he intended to rob him, and that he killed him in the course of the robbery to prevent Smithburger from identifying him.

Applying the standard, the test of the sufficiency of the evidence, as previously set forth, this court is of the opinion that the evidence is sufficient in law to enable a jury to find each and every element of the crime of robbery beyond a reasonable doubt.

4. WAS THE VERDICT OF CONSPIRACY TO COMMIT ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?

5. WAS THE VERDICT OF CONSPIRACY TO COMMIT MURDER AGAINST THE WEIGHT OF THE EVIDENCE?

"(a) A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. . . .

"(e) No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired." . . . 18 P.C.S.A. Section 903.

As to the charge of conspiracy to commit robbery, the Commonwealth established that Blystone, as he was driving on Route 40 toward Hopwood with Powell, Guthrie, and Clark, saw Smithburger, the victim, hitchhiking along the road. Blystone said to Clark "I am going to pick this guy up and rob him, okay, Barbie?" Barbie replied, "yeh, okay, go ahead, I don't care" and George said "yeh, it's cool." (TT - 5B) (TT - 6B)

Blystone then picked up Smithburger, drove off Route 40 onto an isolated road and then placed a gun to the head of the hitchhiker, Smithburger. When they arrived at the Little Brownfield area, Blystone pulled off the road. Blystone told Powell to watch Smithburger so that he would not get out while he went around the car. Blystone then left the car, went to the other side and, during the interval, Powell pointed his hand to the back of Smithburger's head. Blystone, when he got to the other side of the car, removed Smithburger from the car and took Smithburger into the field.

An overt act was committed in pursuance of the conspiracy when Blystone removed Smithburger from the car at gunpoint, took the sum of \$13.00 from him, and subsequently killed him so that he could not identify them.

There was sufficient evidence from which a jury could find beyond a reasonable doubt that Blystone entered into a conspiracy with the other occupants of the car to rob the victim, Smithburger.

As to the charge of conspiracy to commit murder, after Blystone had left the car with the victim at gunpoint, had taken him into the field, and had robbed him, he returned to the car and asked Powell, Guthrie, and Clark as to what he should do "kill the boy or what because he can identify us." After Blystone made that inquiry, Guthrie shrugged her shoulders and Powell said "do what you have to do." Blystone went back into the field and shot Smithburger six times in the back of the head.

The overt act in pursuance of that conspiracy was the killing of Smithburger by Blystone. The Commonwealth has presented evidence from which a jury could find beyond any reasonable doubt that there was a conspiracy between Blystone and the other occupants of the car to murder Smithburger so that he could not identify them.

For the reasons stated herein, the court denies the motion for new trial and motion in arrest of judgment on the charge of conspiracy to commit robbery and conspiracy to commit murder.

6. WAS IT ERROR FOR THE COURT NOT TO CHARGE THE JURY THAT THEY MUST FIRST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?
7. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OBJECT TO THE CHARGE WHEN THE TRIAL JUDGE DID NOT CHARGE THE JURY THAT THEY MUST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?

Trial counsel did not request the court to charge that, in order for the jury to consider the admissions and confessions that he robbed the victim, the Commonwealth must first establish by evidence other than the admissions or confessions of the defendant that a crime was committed. Therefore, this

issue is waived on direct appeal.

Blystone also contends that he was denied his right to effective assistance of counsel in that trial counsel did not request the court to charge on the issue of corpus delecti.

The court would first comment that the standard for evaluating counsel's ineffectiveness has been articulated many times by our Appellate Court. The test is whether the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decisions had any reasonable basis. Commonwealth ex rel Washington vs. Maroney, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); Commonwealth vs. Mott, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

However, it is only when the course or strategy foregone by counsel was of arguable merit or could have supported the claimed defense that the court must inquire as to counsel's position for not pursuing it.

Additionally, there is a presumption that trial counsel was effective, and the burden of establishing counsel's ineffectiveness rests upon the defendant. Commonwealth vs. Miller, 494 Pa. 229, 233, 431 A.2d 233, 235 (1981).

The court will apply this standard in evaluating Blystone's various contentions of ineffectiveness of counsel.

Blystone contends, and properly so, that when the facts of the case present a corpus delecti issue, this issue should be framed in crystal clear terms in the jury instructions. See Commonwealth vs. Fried, 327 Pa. Super. 234, 475 A.2d 773 (1984); Commonwealth vs. Frazier, 411 Pa. 195, 191 A.2d 369 (1963). However, in this court's judgment there was no issue of corpus delecti and it was not ineffectiveness of counsel in failing to request the court to charge on the corpus delecti issue.

The court, for reasons previously set forth in this opinion, determined that the Commonwealth did clearly establish a corpus delecti of robbery, independently of any admissions or statements of Blystone, as well as the corpus delecti of homicide.

In order for counsel's failure to request a charge to constitute ineffectiveness so as to warrant a new trial, it is necessary to establish that the requesting of the charge would have affected the outcome of the case. Clearly, it would not have; therefore, there is no merit in seeking a new trial on this issue.

8. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE TAPE RECORDING OF THE CONVERSATION OF MILES MILLER AND THE DEFENDANT?

Blystone maintains, inter alia:

(a) That the trial judge erred in denying the defendant's motion to suppress communications and evidence since the Commonwealth failed to

establish probable cause to permit the wire-tapping of defendant's conversation.

(b) That the District Attorney should not have permitted the wiretapping of defendant's conversations since it was not demonstrated that the informant was reliable.

(c) That the Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitutions.

(d) That the District Attorney's Office should not be permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

(e) That the defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

(f) That the informant's counsel was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

(g) That the Commonwealth failed to establish that the voice on the tape was Blystone's.

The issue is whether the District Attorney met the requirements of the Pennsylvania Wiretapping and Surveillance Act, 18 Pa. C.S.A., Section 5704(2)(ii) and whether the Act is unconstitutional in violation of the Fourth and Fifth Amendments to the United States Constitutions, and in violation of Article 1, Section 8, of the Pennsylvania Constitution, as an unlawful invasion of privacy.

18 Pa. C.S.A. Section 5704(2)(ii) provides in pertinent part:

"It shall not be unlawful under this chapter for (2) any investigative or law enforcement officer, or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where (ii) one of the parties to the communication has given prior consent to such interception; however, no interception under this paragraph shall be made unless the attorney general or the District Attorney, . . . of the County wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary, and has given prior approval for the interception; however, such interception shall be subject to the recording and record-keeping requirements of Section 5714(a) (relating to recording or intercepting communications) and that the attorney general . . . or district attorney . . . authorizing the interception shall be the custodian of recorded evidence obtained therefrom."

During the suppression hearing held before trial, the Commonwealth established that the State Police had been conducting an on-going investigation since September of 1983 when Smith-burger's body had been found. In December of 1983 Miller provided the Pennsylvania State Police and later the District Attorney of Fayette County with important information concerning the

Smithburger homicide. Miller stated that he had spoken to Powell approximately one month or so prior to going to the State Police with his information. He related what Powell had told him about the murder, specifically how Powell, Clark and Guthrie were present with Blystone on the night that Smithburger was murdered.

Miller also revealed the particulars of the crime as related to him by Powell. Miller described where Smithburger had been picked up by Blystone and the others on the night of the murder, where they drove Smithburger on that night, the fact that it was Blystone who had done the actual shooting, and the amount of money that Blystone had taken from Smithburger. Under the totality of the circumstances, this court is satisfied that there had been a sufficient determination of probable cause to justify the authorization for intercepting and recording Blystone's conversation with Miller.

The District Attorney fully complied with the statute, determining that Miller's consent was voluntarily given and was not the result of either threats or promises. Thereafter, Miller executed a memorandum of consent witnessed by First Administrative Assistant District Attorney Ralph Warman. The District Attorney then executed the memorandum of approval authorizing the interception and recording of Miller's conversation with Blystone. The District Attorney also served as custodian of the recorded evidence in accordance with the statute.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately 15 years specializing in undercover work and electronic surveillance work, had an "A Certification"

in electronic surveillance and wiretapping, which authorizes him to monitor conversations where one party to the conversation has consented to have the conversation intercepted and recorded. An electronic recording device was placed on Miller by Trooper Teagarden which received and electronically recorded the conversation. In addition, a Cal transmitter was placed on Miller which transmitted conversations with Blystone to a recording device in a van that also recorded the conversations.

As to the question of staleness, a determination as to staleness of information as it relates to probable cause must be made on a case-by-case basis. Commonwealth vs. Samuels, 326 Pa. Super. 561, 565, 474 A.2d 632, 634 (1984); Commonwealth vs. Ryan, 300 Pa. Super. 156, 170, 446 A.2d 277, 284 (1982). In the instant case, the information provided by Miller is not the type which would become stale and unable to sustain a finding of probable cause with the passage of time.

Blystone contends that a person in the District Attorney's position cannot be a neutral and detached issuing authority; however, the situation in the instant case was governed by the statute, 18 Pa. C.S.A. Section 5704, which states that the District Attorney is a proper issuing authority under the circumstances, and the court finds as a fact that the Act was fully complied with.

The contention that the Act is unconstitutional must also fail.

Article I, Section 8, of the Pennsylvania Constitution reads:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

All issues raised by Blystone challenging the constitutionality of the Act are addressed in the case of Commonwealth vs. Victor Hassine, ____ Pa. Super. ____, 490 A.2d 438 (1985). See also Commonwealth vs. Doty, ____ Pa. Super. ____, 498 A.2d 870 (1985). The court set forth in Hassine that it is abundantly clear that the type of wiretapping executed here, similar to the one conversant consensual tap allowed under Federal Law, is legal under the U. S. Constitution - citing U. S. vs. Caceres, 440 U.S. 741, 744, 99 S. Ct. 1465, 1467, 59 L.Ed. 2d. 733, 738 (1979).

The court then determined that the General Assembly has given legal responsibility to the law enforcement officers to properly conduct wiretapping where one person consents. 18 Pa. C.S. Section 5704(2)(ii) and 5714(a).

The function of determining whether or not to permit this type of wiretapping was delegated by the Constitution to the General Assembly. Commonwealth vs. Baldwin, 282 Pa. Super. 82, 95, 422, A.2d 838, 845 (1980); Commonwealth vs. Bennett, 245 Pa. Super. 457, 461, 369 A.2d 493, 494 (1976). The court further stated "in such a situation we shall not disturb the Legislature's exercise of discretion especially where the statute does not clearly, palpably and plainly violate the Pennsylvania Constitution.

The Commonwealth identified the voice on that tape as that of Blystone by the testimony of Miller, a friend of Blystone, who engaged Blystone in the conversation that was recorded.

Therefore, since the Act authorizing the recording of the conversations is constitutional, and the Commonwealth fully complied with all of the terms and provisions of the Act, and the Commonwealth established that the recorded voice was Blystone, the refusal to suppress the recorded conversations was proper.

9. DID THE TRIAL JUDGE ERR IN PERMITTING THE MEDIA TO STAND DIRECTLY BEHIND THE JURORS DURING THE PLAYING OF A TAPE?

Blystone maintains that the trial judge was in error in permitting the media to stand behind the jury box while a tape was being played.

Blystone did not object to the position of the reporters at the time of the playing of the tape, and the court does not know in fact where the reporters stood during the time the tape was played. The court was not aware that the reporters were standing behind the jury box during the playing of the tape, but there was no evidence of any impropriety and nothing offered in any way to show prejudice to Blystone. Blystone having failed to object when the incident, as alleged, was taking place, he has waived his right to do so now.

10. THE TRIAL JUDGE ERRED IN ALLOWING THE VICTIM'S FATHER TO TESTIFY CONCERNING THE VICTIM'S CHARACTER, INTELLIGENCE, AND PROPENSITY TO FOLLOW ORDERS.

Prior to the calling of Dalton C. Smithburger, Sr. as a Commonwealth witness, the trial counsel asked for an offer of proof. In response to this request the District Attorney stated, "I intend to offer him to testify as to when he last saw his son and what he was wearing and where he made the identification of the body and also what type of student his son was."

(TT - 24) In response to this offer of proof, trial counsel

stated that he would stipulate to the identification testimony and he objected to the other parts of the offer. The trial court overruled Blystone's objection. (TT - 25) The following testimony was elicited by the District Attorney:

Q Mr. Smithburger, what kind of student was your son?

A Well, he went to Tech School and he passed his welding class.

Q How would you describe your son -- was he a troublemaker?

A No, never a troublemaker.

Q How was he as far as listening?

A He listened pretty good.

Q If someone were to tell him something, would he do it?

A Yes, he would.

Q I believe you told the police he was in special education?

A Yes."

(TT - 26 - 27)

Blystone maintains that this testimony as to the victim's character, intelligence, and propensity to follow orders was improperly admitted.

Blystone argues that the fact the victim was in "special education" could have created an impression in the minds of the jurors that he was a particularly vulnerable victim to criminal activity, and that this testimony had the natural and inevitable effect of creating sympathy for the deceased victim while clouding the issue of Blystone's culpability for his death.

The court feels that this argument is entirely without merit. The testimony, in this court's judgment, is relevant in that it did tend to establish the passive nature of the victim and to lend credibility to the testimony of the Commonwealth witness that the victim, Smithburger, remained in the field for a period of time without fleeing while Blystone returned to the car to discuss the necessity of killing him.

The testimony of the father was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury.

11. DID THE TRIAL JUDGE ERR IN NOT SEQUESTERING THOSE JURORS
SELECTED DURING VOIR DIRE AND TRIAL?

Blystone maintains that the trial judge erred in denying his motion to sequester the jury during voir dire and trial, alleging that he was prejudiced because the publicity surrounding the trial was of such a nature as to deny him a fair trial.

Pennsylvania Rule of Criminal Procedure 1111(a) provides:

"The trial judge may, in his discretion, order sequestration of trial jurors in the interest of justice."

Absent a showing of potential prejudice from the refusal to sequester a jury, the discretion of the trial court will not be disturbed. Commonwealth vs. Sourbeer, 492 Pa. 17, 19, 422 A.2d 116, 121, 122 (1980). Commonwealth vs. Bruno, 466 Pa. 245, 257, n.5, 352 A.2d 40, 46, n.5, (1976).

The Appellate Courts have recognized that the trial court does not abuse its discretion in refusing to sequester jurors where the trial judge continually cautioned the members of the jury to refrain from reading, or listening to, media accounts of the incident. Commonwealth vs. Sourbeer, supra; Commonwealth vs. Smith, 290 Pa. Super. 33, 42-43, 434 A.2d 115, 120 (1981); Commonwealth vs. Gillespie, 290 Pa. Super. 336, 343, 434 A.2d 781, 785 (1981).

This court in the instant case acted promptly and regularly to insure that any publicity which might occur would have no effect on the proceedings. The jurors were cautioned.

at the end of each day's session to refrain from reading any newspaper accounts, listening to radio broadcasts or conversations, and to refrain from discussing the case among themselves. In addition, the court questioned the jury panel prior to the commencement of the trial and at the beginning of each day's session to determine whether any juror had in fact read any newspaper account or heard any radio broadcast that referred to the case or otherwise related to Blystone. These questions were always answered in the negative.

Moreover, unlike the characterization which Blystone urges, the publicity in the instant case was not unusual or prejudicial, but rather was factual and non-hysterical. The media coverage did not exceed that which might be expected to accompany any capital case. Under the circumstances the court is satisfied that there was no abuse of its discretion, nor was there any resulting prejudice to Blystone by virtue of the court's refusal to sequester the members of the jury during the trial.

Blystone next argues that he was denied a fair trial because of inherently prejudicial publicity surrounding both his own trial and that of a co-defendant, George Powell. More specifically, Blystone contends that the jurors selected to hear his case had too much exposure to pretrial information to permit a fair trial.

The United States Supreme Court and the Pennsylvania Appellate Courts have long recognized that one who claims he was denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the empanelling of the jury.

Murphy vs. Florida, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L.Ed 2d 589, 595 (1975); Commonwealth vs. Bachert, 499 Pa. 398, 408, 453 A.2d 931, 936 (1982) cert. denied, 460 U. S. 1043, 103 S. Ct. 1440, 75 L. Ed. 2d 797 (1983); Commonwealth vs. Casper, 481 Pa. 143, 150, 392 A.2d 287, 291 (1978). However, this rule is subject to an important exception:

"In certain cases there 'can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice,' Commonwealth vs. Frazier, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977), because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had."

Commonwealth vs. Casper, 481 Pa. at 151, 392 A.2d at 291.

A presumption of prejudice pursuant to this exception requires the presence of exceptional circumstances. Commonwealth vs. Bachert, 499 Pa. at 412, 453 A.2d at 938. Neither the mere existence of pretrial publicity nor a possibility that prospective jurors will have formed an opinion based on news accounts will suffice to establish a presumption of prejudice. Commonwealth vs. Casper, supra; Commonwealth vs. Keeler, 302 Pa. Super. 324, 329, 448 A.2d 1064, 1066 (1982).

In cases similar to the instant case, the Pennsylvania Supreme Court often refers to a frequently quoted passage in Irvin vs. Dowd, 366 U. S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L.Ed. 2d 751, 756 (1961):

"It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

See Commonwealth vs. Bachert, 499 Pa. at 410-11, 453 A.2d at 937;
Commonwealth vs. Casper, 481 Pa. at 152, 392 A.2d at 292.

The inquiry of primary importance thus becomes whether any juror formed a fixed opinion of Blystone's guilt or innocence as a result of the pretrial publicity. The trial judge in this case participated in the examination of the jurors, and to his satisfaction all who were selected pledged to give fair and impartial consideration to the evidence. None of the jurors expressed an inability to set aside any impression which may have been gained from media coverage.

In selecting the twelve jurors and two alternates, ninety-six potential jurors were individually examined during pretrial voir dire. All jurors who indicated that they had read or heard anything about the case which had caused them to form a fixed opinion as to Blystone's guilt, were excused for cause.

The court is unable to discern, nor has Blystone set forth, any actual prejudice in the seated jurors. The court is also unpersuaded by Blystone's assertion that the pretrial publicity was so inherently prejudicial¹¹ that a climate was created in which Blystone would be denied a fair trial.

A number of the local newspaper stories attached as exhibits to Blystone's brief did not appear prior to the trial, but rather during the course of the trial. Media coverage during the trial and its effect on the jurors has previously been addressed. Other articles from local newspapers appeared far enough in advance of the trial so that any potential prejudice was erased by the passage of time between publication of the stories and the commencement of trial. In any event, all of the articles were highly objective accounts of preliminary proceedings and events in this case. None of the articles can be said to have been so sensational, inflammatory, or inculpatory that a presumption of prejudice was created.

For the reasons set forth, the court rejects the contention of Blystone that he was denied a fair trial as a result of the trial court's refusal to sequester the jury.

12. THE TRIAL JUDGE ERRED IN PERMITTING THE COMMONWEALTH TO
INTRODUCE INTO EVIDENCE A .22 CALIBER HANDGUN SINCE IT FAILED
TO ESTABLISH CHAIN OF CUSTODY.

As to this allegation of error, the standard for the
admissibility is set forth in Commonwealth vs. Mayfield, 262 Pa.
Super. 96, 107, 396 A.2d 662, 667, 668 (1979). The court in
that case stated, citing Commonwealth vs. Jenkins, 231 Pa. Super.
266, 271, 332 A.2d 490, 492 (1974):

"The admission of demonstrative evidence
is a matter committed to the discretion of
the trial court (citation omitted). The
Commonwealth need not discount every
hypothetical possibility of tampering with
the evidence, but need only trace the
chain of custody insofar as possible."
(citation omitted)

The court further stated, citing Commonwealth vs. Miller,
234 Pa. Super. 146, 155, 339 A.2d 573, 578 (1975):

"There is no requirement that the Common-
wealth establish the sanctity of its exhibits
beyond all moral certainty. It is sufficient
that the evidence, direct and circumstantial,
establish a reasonable inference that the
identity and condition of the exhibits
remain unimpaired until they were surrendered
to the court." Id. at 155, 339 A.2d at 578

In the instant case the court finds that the Common-
wealth did establish a proper chain of custody in order for the
weapon to be admitted into evidence.

Jacqueline Guthrie testified that during July of 1983
she and Blystone went to the Genovese Coal Company yard at
approximately 2:00 or 3:00 in the morning. Blystone had
previously worked at Genovese Coal Company and he was going
there because they owed him money and he wanted to try to get

his money. He came back and showed her a black .22 caliber
gun in a leather holster. She testified that it was the same
weapon he had with him on the night of the killing on
September 9th, 1983. She testified she was familiar with the
weapon, that she had carried it, and that she had fired it a
couple of times prior to the evening in question. She examined
the weapon presented in court, which was a .22 caliber H & R
handgun, and testified that this was the weapon she first saw
that night at the Genovese coal yard. She further stated that
in October of 1983 she was with Blystone at the Colonial Bar in
Fairchance and that Blystone gave the gun to Neil Christopher
and Neil left the bar with it. (TT - 14-B - 15-B)

Eugene Tedrow testified that he was an employee of
Genovese Coal Company and that he was so employed by them in
July of 1983, that he had at the Genovese coal yard a .22 caliber
pistol, serial number AN 23544, and he had seen the gun in the
garage on a vanity table. He testified he was the night watch-
man, that the gun turned up missing in July of 1983, and he
described the gun as a .22 caliber H & R pistol.

Neil Christopher testified he received an H & R .22
caliber handgun from Blystone when he met with him at the
Colonial Bar, that Blystone requested he sell it to him, and that
he did sell it to a Richard Grimm of Fairchance, Pennsylvania.
He described the gun as a black handled H & R .22 caliber pistol.

Richard Grimm testified he purchased an H & R .22 caliber
pistol, containing a serial number, from Neil Christopher. Grimm
attempted to repair the handgun, but in effect destroyed it.

Grimm stated he subsequently turned the handgun, which he purchased from Neil Christopher, over to an Officer Killinger of the Pennsylvania State Police (TT - 43 - 45).

Corporal James L. Killinger of the Pennsylvania State Police testified that he received a .22 caliber H & R pistol, with the serial number AN 23544, from Richard Grimm. Corporal Killinger stated that the weapon was completely torn down, the barrel was missing, and the firing pin had been filed off. He further testified he took the weapon to the State Police Barracks in Uniontown, Pennsylvania.

Sergeant George R. Paylock, a Pennsylvania State Trooper, testified he is the custodial officer of all evidence that comes into the possession of the State Police at the Uniontown Barracks in Fayette County. Payock stated that on the 19th of December, 1983, he received from Corporal James Killinger an H & R .22 caliber pistol, serial number AN23544. The H & R .22 caliber pistol was signed out and transported to the crime lab in Greensburg by Trooper A. James Anthony. Subsequently in March of 1984 Trooper Earl Roberts transported the .22 caliber pistol from the crime lab back to the State Police Barracks where it remained in the custody of Sergeant George Payock until it was brought to trial.

The Commonwealth traced the gun from the date it first came into the possession of Blystone through the time it was delivered into court. It is the court's opinion that the Commonwealth has met the standard for admission of the weapon on the issue of custody.

13. THE DEFENDANT'S CASE WAS PREJUDICED WHEN THE COMMONWEALTH WITNESS, NEIL CHRISTOPHER, REFERRED TO THE .22 CALIBER HANDGUN AS THE "MURDER WEAPON."

As to the contention of Blystone that he was prejudiced by the characterization of the weapon as "the murder weapon," this contention is without merit. On direct examination by the Commonwealth, the Commonwealth witness, Neil Christopher, testified as follows:

"Q He had a gun with him?

A Yes, it was with him that evening, yes.

Q Did he show it to you?

A Yes.

Q Why did he show it to you?

A He wanted to sell the murder - or the weapon." (TT - 38)

At this point trial counsel made an objection. The court sustained as to any characterization of the weapon.

No further reference was made to the weapon as the "murder weapon" from any other witness throughout the trial.

The Court is of the opinion that this did not in any way affect the outcome of the trial and, if prejudicial, it was so minimal that it cannot form the basis of consideration for a new trial.

14. THE DEFENDANT'S CASE WAS HIGHLY PREJUDICED WHEN COMMONWEALTH WITNESS, JACQUELINE GUTHRIE, TWICE REFERRED TO DEFENDANT'S CRIMINAL RECORD.
15. THE REFERENCE BY THE COMMONWEALTH WITNESS TO THE DEFENDANT'S CRIMINAL RECORD IMPROPERLY TAINTS THE DEATH SENTENCE DETERMINATION BY THE JURY.
16. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO MAKE A MOTION IN LIMINE TO REQUIRE THE COURT AND PROSECUTION WITNESSES TO AVOID ANY MENTION OF BLYSTONE'S PRIOR CRIMINAL RECORD; BY TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST CAUTIONARY INSTRUCTIONS WHEN THE WITNESS MENTIONED AND IMPLIED THE EXISTENCE OF BLYSTONE'S PRIOR CRIMINAL RECORD; AND BY THE FAILURE OF TRIAL COUNSEL TO MOVE FOR A MISTRIAL WHEN THE REFERENCES OF BLYSTONE'S CRIMINAL RECORD WERE ELICITED BEFORE THE JURY.

During the trial, Jacqueline Guthrie, one of the prosecution's main witnesses, responded to the direct examination of the District Attorney as follows: (TT - 17-B)

"Q Did you yourself carry that weapon?

A A couple of times.

Q Why did you carry it?

A Because he was on parole and he told me to carry it.

MR. WHITEKO: I am going to object to that, your Honor. May we approach the bench?

SIDEBAR CONFERENCE:

MR. WHITEKO: We object to the testimony with regard to his parole.

JUDGE ADAMS: We will sustain. Don't make

reference to his being on parole.
MR. SOLOMON: She told me before that she carried the gun because Scott told her to carry it. I did not expect that answer. She told me that Scott told her to carry it and she was afraid of him and that is what I thought she would say.

END OF SIDEBAR

JUDGE ADAMS: You may restate your question."

The relevant part of the testimony of the witness, Guthrie, during cross-examination by trial counsel, is as follows:

(TT - 25-B)

"Q How long have you known Scott Blystone?

A Do you mean how long have I known him?

Q Yes.

A About six years.

Q How did you meet him?

A I met him through his sister.

Q How long had you been dating him?

A Since he came out of prison in --

Q How many years?

A A year and a half or two years."

The court would note that Guthrie's reference to Blystone having been in jail was not in response to a question asked by the Commonwealth, as indicated by post-trial counsel, but rather was in response to a question asked by defense trial counsel during cross-examination of Jacqueline Guthrie.

The general rule in this Commonwealth is that the testimonial reference which indicates to the jury that the accused has been involved in prior criminal activity is prejudicial. This is not to say that all references which may indicate prior criminal activity warrant reversal. Commonwealth vs. Nichols, 485 Pa. 1, 4, 400 A.2d 1281, 1282 (1979). In the case of Com. vs. Gaerttner, 335 Pa. Super. 203, 228,

484 A.2d 92, 106 (1984), the court stated:

"Although there is no per se rule concerning the admission of evidence pertaining to prior convictions, certain principles may be distilled from the cases. Reference to a criminal defendant having been in jail clearly and unmistakably indicates a prior criminal conviction and the remark is prejudicial. When such a remark is introduced, a mistrial need not necessarily be granted as there are other factors to satisfy the requirement that the appellant receive a fair trial. A crucial consideration is whether the remark was intentionally elicited by the Commonwealth. A corollary to this is whether the answer is responsive to the question asked. In addition, the question of whether curative instructions were given is of great impact. Chief Justice Nix, in the case of Commonwealth vs. Williams, 470 Pa. at 178, 368 A.2d at 252, stated that although we reiterate the admonition to trial courts and prosecutors that they should exercise every possible precaution against the introduction of improper references to prior unrelated criminal activities of the accused, we nevertheless recognize that there will be situations where, even with the greatest care, such evidence may inadvertently impregnate a trial."

In the initial response by Guthrie on direct examination that Blystone was on parole was not in response to any question by the Commonwealth intended to elicit such a response. The District Attorney stated that he did not expect that answer. The witness, Guthrie, had told the District Attorney previously that she was afraid of Blystone and that is what the District Attorney thought she would say as to the reason she was carrying the gun. That answer did not specifically state that Blystone was in jail, but to jurors familiar with the term "parole" it would indicate prior criminal conduct.

The reference by the witness, in response to the question of trial counsel on cross-examination, would indicate

Blystone had been in jail and that Guthrie had been dating Blystone since he was released from jail. "

The court believes that, although this is prejudicial, it was not so prejudicial as to warrant a new trial. The error is harmless in light of the overwhelming evidence of the defendant's guilt presented by the Commonwealth. See Commonwealth vs. Story, 476 Pa. 391, 412, 383 A.2d 155, 166 (1978); Commonwealth vs. Weakland, 273 Pa. Super. 361, 369, 417 A.2d 690, 694, accord, Schneble vs. Florida, 405 U. S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972).

There is no merit in the defendant's contention that the reference as discussed herein to prior criminal activity in any way tainted the death sentence determination of the jury.

Neither the Commonwealth nor the defense made any reference at all to any prior criminal activity on the part of the defendant during the sentencing stage of the trial. The jury found that the death occurred in the commission of the felony of robbery and found no mitigating circumstance.

The jury, in accordance with law, once having made a finding of the death occurring in the commission of the felony of robbery and no mitigating circumstance, had no alternative but to return the death penalty.

As to the issue of ineffectiveness of counsel, Blystone contends that he was denied the right to effective assistance

of counsel by trial counsel's failure to make a motion in limine to require the prosecution witnesses to avoid any mention of Blystone's prior criminal record. In retrospect, it would be more desirable to have done that. The Court would note, however, that no reference was made to any prior criminal record. The witness did make reference to the defendant having been on parole and having been in jail. This would indicate prior criminal conduct on the part of Blystone but, as previously stated, the error was so slight, in view of the overwhelming evidence presented by the Commonwealth of defendant's guilt, that its introduction would not warrant a new trial. It therefore follows that trial counsel's failure to request such an instruction does not constitute ineffectiveness of counsel so as to require the Court, in good conscience, to grant a new trial.

Post-trial counsel further contends that trial counsel was inadequate for failing at that time to seek cautionary instructions or to move for a mistrial. Although trial counsel did not request the court to make any curative instructions to the jury, this does not of itself constitute inadequacy. Where it appears that an explanation by the witness or a curative instruction by the court would dispel any improper inference from an ambiguous remark, defense counsel has the obligation to make a choice either to ask for an explanation or instruction or to disregard the comment so as not to draw attention to it.

Certainly further explanation from the witness could only

be damaging to Blystone and could not, in any way, be helpful.

The potential prejudice from the remark was slight and unlikely to have any impact on the jury during the course of the trial. A cautionary instruction may have merely emphasized the remark in the minds of the jury. See Commonwealth vs. Weakland, supra.

The standard for evaluating counsel's ineffectiveness has been articulated many times by our Appellate Court. The test is whether the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel had any reasonable basis. Commonwealth ex rel. Washington vs. Maroney, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); Commonwealth vs. Mott, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

As to the issue of inadequacy for failing to move for a mistrial, trial counsel's conduct would only have been inadequate if the action would bring about a different result. In this particular case, had the motion for mistrial been sought following the statements of the witness, Guthrie, in response to the question by the Commonwealth, or the response to the question by the defense, the motion would have been denied. The court can see no rational basis to require the granting of a mistrial had such a motion been made.

17. BLYSTONE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PROPERLY INVESTIGATE THE EXISTENCE AND POSSIBLE TESTIMONY OF BLYSTONE'S ALIBI WITNESSES, AND TRIAL COUNSEL'S FAILURE TO CALL ANY ALIBI WITNESSES ON BLYSTONE'S BEHALF DESPITE TRIAL COUNSEL'S KNOWLEDGE OF THE SAME.

The court would first note that the defense did not notify the Commonwealth prior to trial of any intended "alibi defense," as required by Rule of Criminal Procedure 305-C(1)(a)(d). Disclosure by Blystone under this rule is mandatory and is as follows:

"(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(d) Failure to File Notice: If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may take such other order as the interests of justice may require.

The court in Commonwealth vs. Fernandez, 333 Pa. Super. Ct. 279, 289-290, 482 A.2d 567, 571-572 (1984), discussed the

issue of whether it was proper for the court to exclude alibi testimony where a defendant failed to notify the Commonwealth of his intent to call alibi witnesses. There, as here, Blystone had ample opportunity to advise the Commonwealth of the alibi defense, and failed to do so.

Rule 305 addresses the delicate balance between the interest of the accused in presenting a full and complete defense and the interest of the Commonwealth in avoiding fabricated alibis, unfair surprise, and the inevitable delay of justice wrought by an "eleventh-hour defense." See Williams vs. Florida, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 1895-1896, 26 L. Ed. 2d 446, 450 (1970).

Blystone maintains that trial counsel was ineffective for failing to interview and call Sharon Smitley, Donald Smitley, Kathryn LaRue, Mary Kathryn Powell, and Bonnie Gibbs.

Blystone did not notify his defense counsel of the alibi witnesses until the Commonwealth had closed its case. Prior to this time, Blystone did not give any indication to his counsel that there were persons who could establish his presence elsewhere at the time the crime was committed.

At the hearing held to determine whether trial counsel was inadequate, Blystone, in open court, waived the rule of confidentiality between attorney and client. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts recited to him by the defendant, Blystone.

Trial counsel advised Blystone he would not be a party to any action that could possibly result in perjury.

In summary, trial counsel did not attempt to call the alibi witnesses or to interview them because of the late notification, the fact that their testimony would not be relevant, and the purpose for which they were being called would be inconsistent with the statements made by Blystone to trial counsel.

The court would further note that at the close of the Commonwealth's case, in the absence of the jury, trial counsel indicated to the court that Blystone was going to rest and that Blystone had elected to remain silent.

The court conducted a colloquy with Blystone and Blystone's trial counsel concerning his right to testify or to remain silent.

In the court's judgment, Blystone understood his rights and elected not to testify, voluntarily and intelligently, and elected not to call any witnesses. He did not in any way indicate to this court that there were witnesses available he could call in his defense.

Of those persons whom Blystone alleged he could call as witnesses, only Sharon Smitley testified at the hearing held to determine ineffectiveness of counsel. Her testimony was very inconclusive, in the court's judgment, and if it had been offered at trial, it would not in any way have established an alibi for Blystone. She was unable to establish to any degree of reasonable certainty the time Blystone was in attendance at her party.

On cross-examination she stated she did not remember what day of the week this was, whether it was Tuesday, Friday or Saturday. She further testified that she could not state with certainty what time Blystone arrived or the time he left. (T - 79 - 93)

The Commonwealth called Cheryl Tkocs, the court stenographer who took the trial of George Powell, a defendant who was also charged with the homicide of Smithburger, and she testified from her stenographic notes that Sharon Smitley had responded to the question: "How long were George, Scott and Jackie at your party?" "I would say about an hour or so." (T - 100 - 102)

The other persons named by Blystone as alibi witnesses did not testify at the hearing on ineffectiveness of counsel. The court cannot speculate as to what their testimony would have been had they been present at the trial. Therefore, as to those witnesses, the court must find that Blystone failed to prove their testimony would have been beneficial to his case had they been called as witnesses.

It is the court's judgment that Blystone was fabricating an alibi that was totally unsupported.

Under the circumstances of this case, the failure to establish an alibi defense, if one was available (and the court has stated it does not believe it was), was not that of counsel but that of Blystone. Blystone cannot expect to wait until the Commonwealth closes its case and then advise his counsel, for the first time, of witnesses to be interviewed and called.

The court also, as previously stated, finds as a fact that Sharon Smitley is not a credible witness, that her testimony, in the face of the overwhelming testimony of guilt presented by the Commonwealth, would have been meaningless.

Therefore, the court finds that trial counsel was not ineffective for failing to interview or call alibi witnesses for Blystone.

18. THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE BY TRIAL COUNSEL'S FAILURE TO PROPERLY PREPARE THE CASE FOR TRIAL AND FAILURE TO PROPERLY INTERROGATE WITNESSES DURING THE COURSE OF THE TRIAL.

Blystone maintains that trial counsel did not adequately prepare for trial.

Blystone testified at the hearing on inadequacy of counsel that trial counsel had only seen him three or four times for a total of "maybe two hours" prior to trial.

Trial counsel, Jeffrey W. Whiteko, a reputable lawyer at this Bar, maintains a record of the occasions he had made contact with Blystone concerning preparation for trial. These records established that Whiteko met with Blystone on numerous occasions and that he spent a great deal of time, in addition to the interviews with Blystone, reviewing statements and other documentation. (T - 50 through 53)

The court feels that trial counsel spent ample time in preparation of the defense and did all that could be reasonably

required of him in preparing the case for trial.

As to the allegation of Blystone that trial counsel failed to properly interrogate witnesses during the course of the trial, the court finds that this is totally without merit. There is no evidence to support this allegation.

Therefore, the court finds that Blystone was not denied his right to effective assistance of trial counsel.

19. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PURSUE THE COMMONWEALTH'S OFFER OF A PLEA BARGAIN OF LIFE IMPRISONMENT.

The court finds that the allegations of Blystone that trial counsel was ineffective for failure to pursue a plea bargain offer of life imprisonment is totally without merit.

Trial counsel, as well as Alphonse P. Lepore, Jr., the Public Defender, discussed with Blystone the offer of the Commonwealth of a plea bargain of life imprisonment. It was recommended by trial counsel that he accept the plea bargain, but Blystone refused. Blystone did not want to accept the plea bargain because of his belief that the incriminating tape-recording would be suppressed, and he did not want to waive any of his rights. Further, Blystone did not want to do back-up time for his other crimes. He stated he would be an old man when he got out. The failure to accept the plea bargain was solely the determination

of Blystone against the recommendation of his trial counsel.

Blystone cannot now allege ineffectiveness for trial counsel's failure to further pursue it in view of the position of Blystone.

20. WAS THE DEFENDANT'S RIGHT TO A JURY CONSISTING OF A FAIR CROSS-SECTION OF THE COMMUNITY, AS GUARANTEED BY THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, DENIED BECAUSE THE TRIAL COURT ALLOWED THE PROSECUTION TO CHALLENGE FOR CAUSE THOSE POTENTIAL JURORS WHO HAD CONSCIENTIOUS, MORAL, OR RELIGIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY?
21. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO ATTEMPT TO REHABILITATE JURORS WHO EXPRESSED RESERVATIONS CONCERNING THE IMPOSITION OF THE DEATH PENALTY?

In all, five jurors out of ninety-six subjected to voir dire in this case were excused for cause upon challenge by the Commonwealth by reason of their responses to questions concerning the imposition of the death penalty?

This court is of the opinion that it is necessary to review the questions submitted to the jurors, and their responses in their entirety on this issue in order to determine

whether the excused for cause was in order.

Juror number 102 - Hattie M. Royster, - was asked the following questions by the Commonwealth and made the following responses:

"Q If, after hearing all of the evidence in this case, you believed the defendant to be guilty of murder in the first degree, would you return such a verdict?

A Yes.

Q If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?

A Does that mean 'capital punishment?' I don't believe in that.

Q That is the death penalty. Do you have a moral or religious belief against capital punishment?

A I am a Baptist and I don't believe in capital punishment.

Q It is against your religious beliefs to support capital punishment?

A Yes, it is."

(TT - juror 102 -- page 2)

At this point the Commonwealth challenged for cause. The defense counsel objected. The court overruled the objection without any further questions and excused the juror for cause. At the time juror number 102 was excused for cause, the

Commonwealth had all twenty peremptory challenges remaining.¹

The standard in determining whether a juror should be excused for cause as it relates to the imposition of the death penalty is set forth in Commonwealth vs. Datesman, ____ Pa. Super. ____, 494 A.2d, 413, 417, 418 (1985) as follows:

"Whether a juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Datesman cites Witherspoon vs. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Wainwright vs. Witt, 469 U. S. ____, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); and Adams vs. Texas, 448 U. S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

This court, as to Juror Number 102 - Hattie M. Royster - had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that the court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and

¹ In fact, during the entire voir dire the Commonwealth only exercised ten peremptory challenges out of the twenty allocated.

and was properly excluded from the jury for cause.

Juror number 120 - Mary B. Slavic - was asked the following questions and made the following responses:

Q If, during this trial, you were placed in the position to make a determination on the death penalty and you were against or could not find for the death penalty, would you be swayed by any other members of the jury?

A No; I have certain principles and ideals about the death penalty myself.

MR. WHITEKO: The defense will accept this juror, your Honor.

JUDGE ADAMS: The Commonwealth may inquire.

EXAMINATION BY MR. SOLOMON:

Q You said you have certain ideals and principles concerning the death penalty. Do you have any religious, moral, or conscientious scruples against the death penalty?

A Yes, I do.

Q Under any circumstance could you return a verdict that would impose the death sentence?

A No.

Q Under no circumstance?

A Under no circumstance.

MR. SOLOMON: Challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. This means that you would not be asked to serve on this jury. We would ask that you not discuss with any other juror the questions you were asked, your responses, or your reason for not serving on this jury. Thank you. You may step down.

(TT - juror number 120 - page 5)

Juror number 16 - Mario S. Capotosto - was asked the following questions and made the following responses:

- *Q Do you know of any reason why you should not or could not serve on this jury?
- A At the present time, I don't. I may have some reason. It depends on what this is all about.
- Q What do you mean by that?
- A Is this a murder case?
- Q Yes.
- A Is there going to be a capital punishment imposed in case it has to be?
- Q That may come under consideration.
- A I don't believe in that. I don't believe in taking someone else's life.
- Q Then you have a conscientious, moral, or religious scruple against the death penalty?
- A I have.
- Q Under any circumstance could you impose the death penalty?
- A I would not impose the death penalty.
- Q Regardless of the circumstances?
- A Regardless.
- MR. SOLOMON: The Commonwealth would challenge for cause.
- JUDGE ADAMS: Mr. Capotosto, we would excuse you. I appreciate your honest explanation. Please do not tell any other juror why you were excused or tell them any questions you were asked or your responses.
- MR. CAPOTOSTO: I won't.

(TT - juror 16 - pages 6-7)

Juror number 153 - Carol Gowatski - was asked the following questions and made the following responses:

- *Q If, after hearing all of the evidence in this case and taking the law as given to you by Judge Adams, you believe the defendant to be guilty of murder in the first degree, would or could you render such a verdict?

A Yes, sir, unless it was the death penalty.

- Q Do you have any conscientious, moral, or religious scruples against the death penalty?

A I really don't think I could vote for the death penalty.

- Q Under any circumstances, could you vote for it?

A No, sir.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. We would excuse you from further service on the jury. I wish to thank you very much for coming in on such short notice. When you leave, and you may leave now, please stop at the Clerk's Office and sign your pay voucher so that you can get paid for today's service.

(TT - juror 153 -- pages 8 - 9)

Juror number 158 - Frances Page - was asked the following questions and made the following responses:

- *Q If, after you have listened to all of the testimony and the Court has given you the law to apply to the evidence that you heard from the testimony, you believe this defendant to be guilty of murder in the first degree beyond a reasonable doubt, would you return such a verdict?

A No, I don't think I could -- my religious beliefs -- I don't believe in capital punishment or anything like that.

- Q You have religious scruples against the death penalty?

A It is my own individual belief.

Q Under any circumstance could you return a verdict involving the death penalty?

A I couldn't. My conscience would affect me in such a way that I could not serve.

Q Regardless of the evidence you would hear in this case?

A Regardless. It wouldn't be fair if I would serve.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would excuse you. We appreciate very much your coming in on such short notice, and we appreciate your honesty. Would you please turn in your badge and then go to the Clerk's Office so that you can be compensated for today's service.

(TT - juror 158 -- pages 10 - 11)

A review of the testimony of these jurors clearly shows that their exclusion for cause was proper.

There is no merit in Blystone's contention that trial counsel was ineffective because he did not object to jurors numbers 120, 16, 153, and 158 being excused for cause, or attempting to rehabilitate them, since their exclusion for cause was fully justified on the record, and any objections by Blystone would not have altered the situation.

As to juror number 102, trial counsel did object to the court excusing that juror for cause, and preserved that issue for appeal.

22. DID THE TRIAL COURT ER IN DENYING THE DEFENDANT'S MOTION FOR A POST-TRIAL EVIDENTIARY HEARING TO PRESENT TESTIMONY CONCERNING THE PROSECUTION PRONENESS OF THE JURY THAT CONVICTED HIM?

Blystone in his petition dated July 3, 1985, through his post-trial appointed counsel, requested this court to hold a hearing in order to present testimony regarding the prosecution proneness of a death qualified jury.

The evidence sought to be presented by Blystone was not specifically directed to any of the twelve jurors who were selected to sit on this jury, but rather to studies of jurors in general to establish that the "death qualification" of the jury had produced a "prosecution prone" jury.

This concept has not been judicially accepted by any Appellate Court in this Commonwealth and for very good reason.

The Pennsylvania Supreme Court in Commonwealth vs. Sauchon,

506 Pa. 228, 258 n. 13, 484 A.2d 1365, 1381 n. 13 (1985), in a footnote stated:

"That the data remains too tentative and fragmentary to permit an appellate court to judicially notice that 'death-qualified' juries are impermissibly prosecution-prone is demonstrated by the fact that, of the reported cases that have exhaustively analyzed the data following full evidentiary hearings, our research has discovered only one case in which a conviction has been overturned on the basis of that data. Grigsby vs. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), on remand from Eighth Circuit, 637 F.2d 525 (8th Cir. 1980). But cf. Keeten vs. Garrison, 742 F.2d 129 (4th Cir. 1984) reversing the decision of the Federal District Court; Spinkellink vs. Wainwright, 578 F.2d 582 (5th Cir. 1978); Movet vs. Superior Court of Alameda Co., 20 Cal. 3d 1, 168 Ca. Rptr. 128, 616 P.2d 1301 (1980)." Id. at 258, 484 A.2d at 1381, n. 13.

The Superior Court in Commonwealth vs. Batesman, ____ Pa. Super. _____. 494 A.2d 413, 417 (1985), affirmed that more recent opinions have not altered the status of the law in Pennsylvania.

For the reasons stated herein, this court rejects Blystone's position that a new trial should be granted for the reason that the jury was "prosecution prone."

23. DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO USE A PEREMPTORY STRIKE TO ELIMINATE BEVERLY BATTAGLINI FROM THE JURY AFTER THE DEFENDANT'S CHALLENGE FOR CAUSE AS TO SAID JUROR WAS DENIED.

During voir dire, Juror Number 152, Beverly Battaglini, responded to the question concerning employment by any police or investigatory agency that her husband was a District Justice serving in Brownsville. During individual voir dire, which was rather lengthy, Mrs. Battaglini responded to questions of trial counsel as follows:

"Q If Mr. Blystone elected not to present any witnesses or testimony but relied solely on the evidence presented by the Commonwealth and cross-examination, would you feel this would be evidence of guilt?

A You mean if he didn't provide anybody to come forward to testify?

Q Yes.

A I think I would.

Q As Judge Adams stated, he has that right to remain silent.

A Yes.

Q Do you feel at this time that he should present evidence on his behalf?

A Yes, I do.

MR. WHITEKO: Challenge for cause, your Honor.

JUDGE ADAMS: Mrs. Battaglini, we would first ask you -- do you understand that he has no burden to provide any evidence?

A Yes.

JUDGE ADAMS: Would you feel if he didn't, that would be evidence of his guilt?

A You would only be hearing one side and that would be the State of Pennsylvania's side.

JUDGE ADAMS: That is correct, you would have to decide strictly on what the Commonwealth presented, and that is what the law is. The Commonwealth has to prove his guilt. He has no burden to prove anything, so if he offered no evidence what would you do?

A If he offered nothing I would weigh what the Commonwealth was telling me and I would judge from what they have told me whether he was guilty or not guilty.

JUDGE ADAMS: That is all we would ask. Now, if the Commonwealth presented their case and the defendant offered no evidence or testimony at all, how would you feel?

A If I felt the Commonwealth presented enough of a case to find him guilty, I would feel that he was guilty.

JUDGE ADAMS: Let's suppose you found that the Commonwealth did not present enough evidence, in your judgment, to convict the man, would you feel that the fact that the defendant did not offer any evidence or testimony that he was guilty anyway?

A No, I wouldn't go along with it. I would say he was not guilty. This is a man's life we are dealing with. This is the way I feel.

JUDGE ADAMS: I don't believe the juror understood the questions. We would deny the motion for cause.

(TT - juror 152 - pgs. 22 -2)

After further questioning by trial counsel and after Mr. Whiteko conferred with Mr. Blystone, the defendant accepted the juror.

Following interrogation by the Commonwealth, the Commonwealth accepted the juror and she was then selected to serve. No further reference was made to this juror at any time during the trial.

Blystone now maintains that it was ineffective assistance of counsel for failure to exercise a peremptory challenge with regard to this juror.

At the hearing held for the purpose of determining inadequacy of counsel, Blystone admitted that he agreed to the acceptance of the juror but did so rather grudgingly. The court finds as a fact that the juror was retained at the insistence of Blystone.

Trial counsel was of the opinion that the juror would not be a bad juror. He thought from interviewing her that she would be an honest juror, would listen to the evidence, and render a true and just verdict.

Blystone was well aware that the juror was the wife of a magistrate. This was discussed with him by trial counsel.

It was a matter of judgment as to whether the juror should be left on or stricken. Apparently Blystone, who wanted her on the jury initially, changed his mind the following day and asked that the juror at that time be challenged peremptorily. Trial counsel properly advised Blystone that he could not do so because once having been accepted, she would not be dismissed from the jury except for cause. There was no cause demonstrated at any time for which Blystone could have excluded her from the

jury panel. Therefore, the action of trial counsel was not inadequate as it relates to the selection of the juror.

24. DOES THE PENNSYLVANIA DEATH PENALTY SENTENCING STATUTE VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE STATUTE DEFINES AGGRAVATING CIRCUMSTANCES IN AN OVERBROAD AND ARBITRARY FASHION?

25. DOES THE USE OF THE WORD "MUST" IN THE PENNSYLVANIA DEATH PENALTY STATUTE RENDER SAID STATUTE UNCONSTITUTIONAL UNDER BOTH THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.

In Commonwealth vs. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), the Pennsylvania Supreme Court thoroughly addressed the very issues concerning the constitutionality of Section 9711 of the Sentencing Code raised by Blystone in the instant case.

In Zettlemoyer, the appellant was charged with and convicted of first degree murder, and in a separate hearing received the death sentence. Following the denial of the post-conviction motions, the case was automatically appealed to the Pennsylvania Supreme Court pursuant to 42 Pa. C.S.A. Sections 9711(h)(1) and 722(4). The Supreme Court affirmed the appellant's conviction for murder of the first degree, affirmed the sentence of death, and upheld the constitutionality of Section 9711 of the

Sentencing Code under both Federal and State Constitutions.

Significantly, the court in Zettlemoyer found that juries in Pennsylvania are not mandated to impose the death penalty in all cases of murder of the first degree, and are not left without guidelines in the determination of whether to impose death or life imprisonment. Commonwealth vs. Zettlemoyer, supra, at 71, 454 A.2d at 966.

Under 42 Pa. C.S.A. Section 9711(c)(1)(iv) the jury may only return a sentence of death in two distinct situations:

"The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

9711(c)(1)(v) provides:

"The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment."

This requirement that the jury's decision of the death sentence be unanimous, together with the provision that the defendant receive life imprisonment if a unanimous verdict cannot be reached, provides an important safeguard for a defendant convicted of murder of the first degree.

Similarly, the provision for automatic appellate review, pursuant to Section 9711(h)(1), is a very important

factor in a constitutionally permissible legislative scheme for imposition of the death penalty. Such a review is a "last line of defense" to guard against arbitrary sentencing by a jury. Commonwealth vs. Zettlemoyer, 500 Pa. at 60, 454 A.2d at 960.

Blystone in the instant case argues that the Death Penalty Statute is arbitrary, unreliable, and limits juror discretion. More specifically he argues that the statute does not provide for sufficient consideration of mitigating circumstances. In Zettlemoyer the Supreme Court noted that the Pennsylvania Legislature, by enacting Section 9711 of the Sentencing Code, responded to the announcements of the court in Commonwealth vs. Moody, 476 Pa. 223, 382 A.2d 442 (1977) and of the United States Supreme Court in Lockett vs. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The deficiency identified in those cases was the failure to permit the jury to consider a sufficiently broad spectrum of circumstances relating to both the character of the offender and the offense with which he is charged.

Section 9711(e) cured this deficiency by providing the jury with a wide range of seven specific mitigating circumstances which they may consider and, additionally, "(a)ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. C.S.A. Section 9711(e)(8). Commonwealth vs. Zettlemoyer, 500 Pa. at 57, 454 A.2d at 958-59. Jury discretion is thus neither eliminated nor unduly limited, but rather is channeled in order to ensure

that the death penalty will be imposed in a consistent and rational, as opposed to an arbitrary and capricious, manner.

26. SHOULD THE TRIAL JUDGE HAVE PERMITTED TRIAL COUNSEL TO INTRODUCE EVIDENCE TO ESTABLISH MITIGATING CIRCUMSTANCES ALTHOUGH THE DEFENDANT WAS OPPOSED TO OFFERING ANY EVIDENCE OF MITIGATION?

Blystone maintains that the trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances although Blystone was inalterably opposed to offering any evidence of mitigating circumstances either through his own testimony or by any other witnesses.

This trial was unusual in that Blystone not only did not offer any testimony during the innocence or guilt phase of the trial but refused to offer any testimony on his own behalf or permit defense counsel to offer any testimony of other witnesses on his behalf in the penalty stage of the proceeding.

Following the finding of guilty of murder in the first degree, and prior to the sentencing phase, trial counsel advised the court that, after lengthy discussions with Blystone, and over trial counsel's strenuous objections, Blystone stated he wished to offer no evidence. Trial counsel indicated he had interviewed Blystone's parents on several occasions and that he wished to put them on the stand and also wished to put Blystone on the stand, but after two hours of discussion with

him, Blystone still remained adamant in his position that he did not want any testimony offered on his behalf during the sentencing phase of trial. At this point the court extensively advised Blystone of the procedure that would follow during the sentencing phase of the trial and that Blystone had the burden of proving by a fair preponderance of the evidence mitigating circumstances that would prohibit the imposition of the death penalty by the jury in the event the Commonwealth would prove beyond a reasonable doubt the presence of aggravating circumstances. The court explained to Blystone that if the jury found the murder was committed in the commission of a robbery that this would be an aggravating circumstance, and if there were no mitigating circumstances the jury must impose the death penalty.

After this colloquy, Blystone consulted with his trial counsel. Trial counsel then stated that Blystone wanted to know if his failure to testify or to offer any evidence during the sentencing phase of the trial would affect his right to appeal from any finding by a jury of murder in the first degree or the penalty that would be imposed. The court explained to Blystone that it would not affect his right of appeal from the conviction or the imposition of sentence, but that he could not raise as a defense to the imposition of the sentence that no testimony was offered on his behalf, and that he would be waiving that right.

The court again stated to Blystone - "do you wish to testify yourself or to have your parents testify or to offer

any other evidence in this case? You had better think very carefully before you answer that question. I would tell you that I am not insisting that you testify - don't misunderstand me - because whatever decision you make I am going to abide by, but I just want to make sure that you fully understand what you are doing because tomorrow you cannot change your mind. I would ask you to consult with your counsel one more time, and then after consulting, tell me what you want to do and we will respect your wishes." Following this Blystone consulted with his counsel and, upon inquiry by the court - "what is your decision, Mr. Blystone?", he replied, "I have no testimony and no witnesses," to which the court stated "either through yourself or anyone else?", and Blystone's answer was "no." (TT - 140 - 144)

The court inquired of Blystone if he was taking any narcotics or medications of any kind that might affect his reasoning and Blystone stated that he was not.

The court determined, and so stated on the record, that the court found Blystone to be an intelligent man who understood what had been explained to him and that the decision he made not to offer any testimony himself or by anyone else during the sentencing phase of the proceeding was made after careful consideration and after numerous consultations with his counsel, and that he fully understood the possible consequences of his decision not to offer any testimony.

Blystone has an absolute right to remain silent, not only during the innocence or guilt phase of the trial, but

also during the sentencing phase. The court could not compel Blystone to offer any testimony in either phase of the proceedings nor could the court permit Blystone's counsel to offer testimony over the objections of Blystone.

The court cannot speculate as to what would have been the effect of testimony offered by Blystone or by other witnesses during the sentencing phase of the proceeding. Blystone, however, was given the full opportunity to present whatever evidence he wished to offer by way of mitigation. Once he exercised his constitutional right to remain silent voluntarily and with full knowledge of the consequences of his decision, he cannot now raise the objection that testimony should have been offered on his behalf over his objection.

27. THE PRESENT SITUATION DOES NOT PRESENT CIRCUMSTANCES IN WHICH THE DEATH PENALTY IS APPROPRIATE, AND ITS IMPOSITION SHOCKS ONE'S SENSE OF JUSTICE, AND SAID DEATH PENALTY SHOULD BE OVERTURNED BY THE TRIAL COURT AND A TERM OF LIFE IMPRISONMENT IMPOSED.

In the instant case the Commonwealth presented evidence to establish beyond a reasonable doubt that Blystone robbed Smithburger and then intentionally and willfully murdered him to prevent Smithburger from identifying him.

The finding by the sentencing jury that the murder occurred in the commission of the felony of robbery is an aggravating circumstance that would require imposition of the death penalty where the jury, as here, found no mitigating circumstance.

The sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases in this Commonwealth. Commonwealth vs. Frey, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied 105 S. Ct. 360 (1984); Commonwealth vs. Stoyko, 504 Pa. 455, 475 A.2d 714 (1984), cert. denied 105 S. Ct. 361 (1984); Commonwealth vs. Morales, ____ Pa. ____, 4914 A.2d 367 (1985); Commonwealth vs. Rettlemyer, 500 Pa. 16, 454 A.2d 937 (1983).

After a careful review of the facts and circumstances of this case, and with the full realization of the effect of this decision, this court feels that the circumstances required, beyond a reasonable doubt, the imposition of the death penalty.

This court can find no reason to warrant setting aside the death penalty and imposing a sentence of life imprisonment.

For the reasons herein stated, the Court denied the motion for new trial and the motion in arrest of judgment by order entered March 12, 1986.

Attest

Charles Baer
Clerk

April 17, 1986

BY THE COURT.

Just Adams, J.

COMMONWEALTH,	:	IN THE COURT OF COMMON PLEAS OF
vs.	:	FAYETTE COUNTY, PENNSYLVANIA
	:	CRIMINAL DIVISION
SCOTT WAYNE HOLYSTONE,	:	NO. 2 of 1984, NO. 2 1/4 of 1984,
Defendant.	:	NO. 2 2/4 of 1984, and NO. 2 3/4
	:	of 1984

INDIVIDUAL VOIR DIRE OF
JURORS NUMBERED 102, 120,
16, 153 and 158

APPEARANCES:

GERALD R. SOLOMON, District Attorney

JEFFREY W. WHITENO, Assistant Public Defender

Patricia A. Miller
Official Stenographer

FILED
APR 11 1986
CLERK OF COURT
FAYETTE COUNTY, PA

HATTIE M. ROYSTER, sworn

EXAMINATION BY JUDGE ADAMS:

Q Please give us your badge number and your name?

A Badge number 102 -- Hattie M. Royster.

Q What is your address?

A Box 146, Republic, Pa.

Q Are you married?

A Yes.

Q What is your husband's name?

A Cleo.

Q Do you have any children?

A Yes.

Q Give us their names and ages please.

A My oldest one is Butch and he is forty-five; then there is Cleo, Jr. and he is forty-four; Carolyn, forty-two; Dwayne, thirty-seven; one is deceased and he would have been thirty-two; and Kevin and he is twenty-seven.

Q Are you employed?

A No, I am not.

Q Is your husband employed?

A No, he is retired.

Q What was his employment prior to his retirement?

A Foreman at Gateway Coal Company.

Q I believe you answered during the questioning of the panel that you know the District Attorney, Mr. Solomon?

A Yes, I do.

Q Has he ever represented you or any member of your family?

A Yes.

Q Would the fact that he represented you in any way influence your judgment in this case in which he is the lawyer?

A With Dwayne, the one he represented?

A No -- I mean, would the fact that he represented you or a member of your family in any way affect your judgment since he is the prosecutor in this case?

A No.

JUDGE ADAMS: The Commonwealth may inquire.

EXAMINATION BY MR. SOLOMON:

Q Do you know of any reason why you should not or could not serve on this jury?

A No.

Q If, after hearing all of the evidence in this case, you believed the defendant to be guilty of murder in the first degree, would you return such a verdict?

A Yes.

Q If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?

A Does that mean "capital punishment?" I don't believe in that.

Q That is the death penalty. Do you have a moral or religious belief against capital punishment?

A I am a Baptist and I don't believe in capital punishment.

Q It is against your religious beliefs to support capital punishment?

A Yes, it is.

MR. SOLOMON: Challenge for cause.

MR. WHITEKO: I would object to the challenge based on her answer.

JUDGE ADAMS: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. We would overrule the objection. Mrs. Royster, we would advise you that you are not going to be asked to serve on this jury because of your feeling. I would ask you please not to discuss with any other juror the questions that were asked you or your reason for being excused. Thank you. You may step down.

MARY B. SLAVIC, sworn

EXAMINATION BY JUDGE ADAMS:

Q Would you give us your name, badge number, and your address please.

A Mary B. Slavic, number 120, and the address is Box 739, Connellsville. I am currently living in Ohio.

Q Are you married?

A Single.

Q Are you presently employed?

A I am a photographer - free lance.

Q Do you have any particular employer that would hire you more often than another?

A No, not at the present time -- I just contract my work.

MR. WHITEKO: I am sorry, your Honor -- I didn't hear what her employment is.

A I am a photographer - free lance - on a contractual basis.

COMMONWEALTH, : IN THE COURT OF COMMON PLEAS OF
vs. : FAYETTE COUNTY, PENNSYLVANIA
SCOTT WAYNE BLYSTONE, : CRIMINAL DIVISION
Defendant. : NOS. 2, 2 1/4, 2 2/4 and 2 3/4 of
1984

CLOSING ARGUMENTS OF GERALD R. SOLOMON
AND JEFFREY W. WHITEKO WITH REGARD TO
THE PENALTY TO BE IMPOSED BY THE JURY
AFTER THE JURY HAD RETURNED A FIRST
DEGREE VERDICT.

Patricia A. Miller
Court Reporter

6/13/84

MR. SOLOMON: May it please this most Honorable Court, Mr. Whiteko, and Ladies and Gentlemen of the Jury. As Members of this Jury and having found the defendant guilty of murder in the first degree, you now face a solemn and serious decision, whether the defendant shall receive life in prison or shall receive the death penalty. If anyone thinks that I enjoy, or the Commonwealth enjoys coming before you and asking for the death penalty, they have another thought coming. It is much, much easier to represent the Commonwealth in a non-capital, non-serious case, but it is my duty, as the District Attorney of Fayette County, to come before you and to represent the Commonwealth to the best of my ability, and it is your duty as jurors, your sworn duty, to follow the law and to apply that law to this case. You did that earlier in returning your verdict and I am sure you will do it when you retire to deliberate the penalty. As before, you must follow the law as his Honor, Judge Adams, will give it to you to determine what the penalty should be. Our law doesn't permit the jury to impose the death penalty or impose a life sentence as they feel it should be, but rather there are certain specific times when the death penalty should be imposed and there are certain specific times when it should not be imposed. The court touched upon it and told you of aggravating and mitigating circumstances. The aggravating circumstance in this case is that this defendant committed a felony -- excuse me -- committed a killing in the perpetration of a felony. The felony in this case was the robbery. You have already made a determination by your verdict that this defendant

was guilty of that robbery, so you have the aggravating circumstance. It is already proven and you already believed it. Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty; so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it. The Commonwealth would admit to you that somewhere -- somewhere in his life this defendant, for whatever reason, decided that human life wasn't very valuable, decided that taking a human life was like any other act. People pray at night -- you wish during your life that you will live to a ripe old age and die a peaceful death -- a nice, peaceful death -- and the thought of having six shots fired in the back of your head is something that none of us want to think about. Animals -- lowly animals -- fight desperately for their lives. No one wants to throw away life. Somewhere in his life, Scott Blystone decided that human life has no more value than \$13.00. I would ask that each of you listen closely to the instructions the Court gives you. There is no doubt that there is an aggravating circumstance that is present. You must determine from the evidence presented in this Courtroom whether or not there are any mitigating circumstances; if not, you must follow the law and impose the death penalty. Once again, as in

the initial proceedings where you determined guilt or innocence, you cannot be guided by sympathy for the defendant or the victim. You must follow the law and I am confident that you will. Thank you very much.

JUDGE ADAMS: Mr. Whiteko.

MR. WHITEKO: Judge Adams, Mr. Solomon, Trooper Goodwin -- Ladies and Gentlemen of the Jury, good afternoon. I spent a troubled evening last night thinking about the possibility of this going to this stage, and I was going to argue to you many, many points concerning what my reasons were against the death penalty as a lawyer, and I started writing them all down, had the Legislative Journal, was going to state to you how it is not a deterrent, how statistics prove that people still shoot people, and that the death penalty doesn't warrant the reasons that are going to be put forth, but ladies and gentlemen of the jury, I am not going to do that. I am not going to tell you that I am not begging you for your mercy. I am going to beg. Excuse me if I ramble and babble, but I am going to tell you that we are talking about a twenty-eight year old man, an intelligent man. He is young and there is still a possibility - years down the road possibly - to help develop this person. What happened that night to Dalton Smithburger is a tragedy, but it would be an equal tragedy to take another man's life because we cannot change what happened that night. Now, the Legislature, as Judge Adams will tell you, stated that you are to put to death some persons in certain instances, and Mr. Solomon says that this is the instance when

MR. BLYSTONE: I don't want anybody else brought into it.

JUDGE ADAMS: What did he say?

MR. WHITEKO: He doesn't want anybody else brought into this matter, your Honor.

JUDGE ADAMS: Is that your only reason for not offering any testimony?

DEFENDANT SHAKES HIS HEAD "YES."

JUDGE ADAMS: Of course, if you testify yourself that would not be bringing anyone into it except yourself, do you understand?

MR. BLYSTONE: Uh-huh.

JUDGE ADAMS: Very well. Would counsel approach the bench please.

SIDEBAR CONFERENCE OFF THE RECORD.

JUDGE ADAMS: You may bring in the jury.

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

JUDGE ADAMS: Members of the Jury, you have found the defendant guilty of murder in the first degree and your verdict has been so recorded. We are now going to hold a sentencing hearing during which counsel may present additional evidence and arguments and then you will decide whether the defendant is to be sentenced to death or life imprisonment. Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances there are in this case. Generally speaking, aggravating and mitigating circumstances are circumstances concerning the killing and the killer which makes a first degree murder case either more serious or less serious. The Crimes Code defines more precisely what constitutes aggravating and mitigating circumstances. I will give you detailed instructions later in this hearing as to what constitutes an aggravating circumstance and what constitutes a mitigating circumstance, but we would tell you at this time that aggravating circumstances must be proved by the Commonwealth

beyond a reasonable doubt as I explained reasonable doubt to you during the charge. While mitigating circumstances must be proven by the defendant, the burden of proof is of a lesser degree. It is only by a fair preponderance or by a preponderance of the evidence, which simply means that it exceeds in weight. Is the Commonwealth prepared to proceed?

MR. SOLOMON: If the Court please, the Commonwealth is ^{prepared to} present testimony regarding the aggravating circumstance that the defendant committed a killing while in the perpetration of a felony, and the felony would be robbery that was committed on Dalton Charles Smithburger. If the Commonwealth were to call witnesses, the Commonwealth would call Barbara Clark, Jackie Guthrie, Miles Miller, and Trooper Teagarden to play the tape of the conversation between Miles Miller and Scott Blystone. Since that testimony has already presented to this jury, to present the same testimony would merely be a reiteration of that testimony. The Commonwealth would rely upon the recollection of the jury regarding that testimony and they would not need to call any further witnesses at this time, your Honor.

JUDGE ADAMS: Very well. Does the defense wish to offer any evidence or testimony?

MR. WHITEKO: Your Honor, we don't wish to offer any additional testimony at this time?

JUDGE ADAMS: Is that your decision, Mr. Blystone?

MR. BLYSTONE: Yes, it is.

JUDGE ADAMS: Mr. Whiteko, it is my understanding that you are not offering any testimony either from the defendant or from anyone else, is that correct?

MR. WHITEKO: Yes, your Honor, that is correct.

JUDGE ADAMS: Members of the Jury, as I told you earlier, the defendant has

an absolute right during the trial of this case to remain silent. He has no duty to offer testimony during the trial of the case. He also has that same right during a sentencing hearing such as we have here. He has an absolute right not to offer any testimony either through himself personally or through other witnesses. The same standard that I told you applied in the trial of this case also applies in the sentencing aspect of this case. The fact that the defendant elects not to offer any testimony is not of itself any indication of the penalty you might wish to impose. The Commonwealth still has the burden of proving the aggravating circumstance beyond a reasonable doubt whether he offers anything or not. You would also have the obligation, even though no testimony is offered during this proceeding, to determine from all of the testimony - that is, what you heard during the trial of the case - whether or not there are aggravating circumstances or whether or not there are mitigating circumstances. Is there anything which counsel for the Commonwealth would wish to present to the jury before argument on the penalty?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Is there anything further which the defense would wish to present before argument to the jury on the penalty?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: We would first hear from the Commonwealth.

MR. SOLOMON: Thank you, your Honor.

ARGUMENT BY MR. SOLOMON.

JUDGE ADAMS: Mr. Whiteko.

ARGUMENT BY MR. WHITEKO.

JUDGE ADAMS: Members of the Jury, the Court will now instruct you as to the standard you are to apply in reaching your determination. As I told you earlier, you may consider all the testimony that you heard. You may consider anything that you heard or found believable in the first trial.

During that period of time you heard testimony concerning the commission of a robbery. You made a finding of guilty on that charge. You made a finding of guilty on the charge of criminal homicide. If you find that the killing occurred in the commission of that robbery, that is an aggravating circumstance. You would need to find beyond a reasonable doubt that the killing occurred in the perpetration of that robbery. If you so find, that would be an aggravating circumstance. The Crimes Code defines what are aggravating and mitigating circumstances, -- for example, the victim was a fireman, police officer or public servant concerned in official detention who was killed in the performance of his duties. Of course, that is not applicable here so I am not going to give you the aggravating circumstances that are not applicable - only that which is, and there is only one aggravating circumstance that you could find, and that is that the killing occurred in the commission of the felony of robbery, if you find this occurred beyond a reasonable doubt. If you find that there is an aggravating circumstance, and you must unanimously find it, you would then need to determine if there were any mitigating circumstances, which I will explain to you. If you find an aggravating circumstance and no mitigating circumstances, it is your duty to return a verdict of death. If you find that there are mitigating circumstances, then you would need to determine whether the aggravating circumstance or aggravating circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty. If you find no aggravating circumstances, you must return the penalty of life imprisonment, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you must return life imprisonment. The Crimes Code provides that the following matters, if proven, constitute mitigating circumstances. I am going to read to you everything under the Crimes Code that you might consider as a mitigating circumstance. In order

to consider them, you would have to find evidence that would justify the finding of mitigating circumstances. As I said to you, that finding of mitigating is not the same standard. It is just if you find that the evidence of mitigation is greater than the other way by a preponderance of the evidence, which means simply to exceed in weight, and then you would make a finding of mitigating. These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; and any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense. I am going to repeat those to you, and as I told you, they are only applicable if proven by a fair preponderance of the evidence: The defendant had no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; whether the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal

act was relatively minor, and any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. If any of you would want any further instructions as to what constitutes aggravating circumstances or mitigating circumstances, raise your hand. (no response). As I told you, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. All of the evidence from both sides, including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances, is important and proper for you to consider. You should not decide out of any feeling of vengeance or prejudice toward the defendant. As I told you earlier, which I am going to stress again, that it is entirely up to the defendant whether to testify or to offer any evidence, and you must not draw any adverse inference from his silence or the fact that he elected not to present any evidence. The verdict is for you, Members of the Jury, to decide. Remember and consider all of the evidence, giving it the weight to which it is entitled. I want you to understand that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. In order for you to return a verdict of death, all twelve of you must unanimously agree upon that verdict. Your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases your verdict must be a sentence of life imprisonment. You will be given a special verdict slip applicable to this decision you need to make. It will differ from the verdict slip which I previously gave to you. Under the

first paragraph it reads: "We, the jury, unanimously sentence the defendant to ..." -- there is typed the word "death" or the words "life imprisonment." Depending upon the determination you make, you will enter a checkmark opposite "death" or opposite "life imprisonment." If you find "life imprisonment" you need go no further with your verdict slip. You would simply check the "life imprisonment" and do nothing else. Have the foreman that you select sign the verdict slip and return it to the Courtroom. If you find the death penalty is to be imposed, you would need to go to the second paragraph which says: "We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstances." If you would find that to be the case, you would have checked the death penalty on number one and you would have checked in the space opposite what I just read you under paragraph two. If you find that there are aggravating circumstances and also mitigating circumstances, you would then go to the next paragraph which says: "We, the jury, have found unanimously one or more aggravating circumstances which outweigh any mitigating circumstances." Repeating what you would do -- you would first make the determination of whether the sentence is death or life imprisonment. If you decide it is life imprisonment, you would go no further. Just simply have the foreman sign the verdict slip and return to the Courtroom. If you find that death is to be imposed, then you would need to show whether you found aggravating circumstances and no mitigating circumstances. That would be paragraph two. If you found an aggravating circumstance and no mitigating, you go no further. Just check that block and sign it. If you find that there were both aggravating and mitigating, you would not check the second block but go to the third and check that the aggravating circumstances outweigh the mitigating. I told you on the other verdict slips that you were to make no comment on the verdict slips except the finding of guilty or not guilty. That is not the

case on this verdict slip. If you find that there is an aggravating circumstance, you would write on the verdict slip what that aggravating circumstance was. In this case there is only one aggravating circumstance that you could find and that is that the death occurred in the commission of a robbery. If you find beyond a reasonable doubt that that is an aggravating circumstance which would outweigh the mitigating, then you would write that on the verdict slip. Does any juror wish any further explanation on how you would deal with the verdict slip? (no response). I think when you read it that it will be self-explanatory, at least I hope that it will, but I would stress to you that you must write on it, that is the foreman must write on it what the aggravating circumstance you found was. As I stated to you, your verdict must be unanimous in this case to impose the death penalty. If, after conscientious and thorough deliberations, you are unable to agree on your findings and verdict, you should report that to the Court. If in my opinion further deliberations would not result in a unanimous agreement of the sentence, it would be my duty then to sentence the defendant to life imprisonment. What I am telling you, if you do not unanimously agree on the death penalty, then the sentence imposed would be that of life imprisonment. Would counsel for the Commonwealth wish any additional correction or clarification of the charge?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Does any Member of the Jury wish any additional clarification of the charge or the verdict slip? (no response). Members of the Jury, you have one of the most solemn duties ever to be imposed on anyone. You must sit in judgment of a person and determine whether they should be sentenced to life or death. You have a sworn duty to take the law as the

Court gives it to you and follow that duty in accordance with the instructions I have given you. You may now retire and consider your verdict.

JURY RETIRED AT 3:10 p.m.

AT 3:46 p.m. the jury returned to the Courtroom with a question, and the colloquy is as follows:

JUDGE ADAMS: Mr. Foreman, do you have a question?

FOREMAN OF THE JURY: We would like you to repeat what constitutes a mitigating circumstance.

JUDGE ADAMS: All right. The Legislature has determined what constitutes mitigating circumstances. I am going to read to you those things that you could consider but you are only to consider them if there is evidence that would cause you to believe that they exist. For purposes of this case, the following matters, if proven, can constitute mitigating circumstances: The defendant has no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; whether the defendant acted under duress, extreme duress, or acted under the substantial domination of another person -- now, this would be duress from some other source; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal act was relatively minor; and the last catch-all -- any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. The first seven are the specific matters you could consider. The last is the catch-all -- any other mitigating circumstances that result from the character or record of the defendant or the circumstance

of the case. It would be your duty to consider these types of mitigating circumstances and if there is evidence from which you can make a finding that they existed, you would consider them but if there is no evidence concerning them at all, of course there is then nothing for you to consider in determining whether or not that is a mitigating circumstance. Mr. Foreman, as far as you are concerned, do you think that answers your question personally?

FOREMAN: Yes.

JUDGE ADAMS: Now, does any other Member of the Jury have any question concerning aggravating or mitigating?

JUROR: The last line -- any other mitigating circumstances. Would you explain that.

JUDGE ADAMS: It states "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." This is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance, but it should be, in determining it, something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense. If you find anything in these that you consider to be mitigating, you might consider them, and then you would weigh whatever you found to be mitigating against whatever you found to be aggravating, if you found aggravating. If the mitigating outweighs the aggravating, it must be life imprisonment. If the aggravating outweighs the mitigating, then it must be death. Does that answer your question?

JUROR: Yes, sir.

JUDGE ADAMS: Does any other juror have any other question?

NO RESPONSE

JUDGE ADAMS: Does the Commonwealth wish me to make any further instruction or clarification?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Very well. You may retire and continue your deliberations.

JURY RETIRED AT 3:50 p.m.

6/14/84 --- 10:00 a.m.

The following took place in Courtroom number 1 in the presence of Judge Adams, Mr. Solomon, Mr. Whiteko, Scott Wayne Blystone, Wanda Budner of the Clerk of Court's Office, and the court reporter:

JUDGE ADAMS: It was called to the Court's attention after the jury had been discharged that inadvertently the stenographer was not in the Courtroom to record the taking of the verdict of sentence nor was the stenographer present when I gave the defendant his rights, so it is going to be necessary that I repeat the rights so they are on the record and that we establish on the record what took place yesterday. We would at this time ask the clerk for the record to state her name and her occupation.

MRS. BUDNER: My name is Wanda Budner and I am a clerk in the Clerk of Court's Office.

JUDGE ADAMS: Were you the clerk that took the verdict of sentence following the conviction of the first degree homicide as determined by the jury?

MRS. BUDNER: Yes, I was.

JUDGE ADAMS: For the record will you read what that verdict was.

MRS. BUDNER: We, the jury, unanimously sentence the defendant to death. We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance - death

COMMONWEALTH,

vs.

SCOTT WAYNE BLYSTONE,

Defendant.

: IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA
: CRIMINAL DIVISION

: NO. 2 of 1984

CONVICTION - FIRST DEGREE HOMICIDE

SENTENCE OF THE JURY

1. We, the jury, unanimously sentence the defendant to

☒ Death

☐ Life Imprisonment

2. We, the jury, have found unanimously

☒ at least one aggravating circumstance and no
mitigating circumstance. The aggravating
circumstance(s) (is) (are):

Death resulted during commission of a robbery.

☐ one or more aggravating circumstances which outweigh
any mitigating circumstances. The aggravating
circumstance(s) (is) (are):

Jury Polled

NO. 12

Paul Davis
Foreman

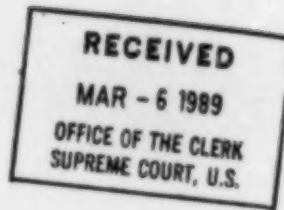
6
1
w

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-6222



SCOTT WAYNE BLYSTONE, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

For two reasons the Petition for Writ of Certiorari should be denied in the instant case. First, as we show in Part I, the Commonwealth's challenge for cause of prospective Juror Number 102 was properly granted by the trial court because her opposition to the death penalty demonstrated an inability to perform her duty as a juror. Second, as we show in Part II, the mandatory language of the Pennsylvania death penalty statute does not render said statute unconstitutional under the United States Constitution because adequate safeguards for defendant/petitioner are contained therein.

I.

The trial court in the case sub judice properly granted the Commonwealth's challenge for cause of prospective Juror Number 102 because her opposition to the death penalty demonstrated an inability to perform her duty as a juror. A recitation and review of the relevant voir dire testimony follow.

EXAMINATION BY MR. SOLOMON (District Attorney)

- Q. Do you know of any reason why you should not or could not serve on this jury?
- A. No.
- Q. If, after hearing all the evidence in this case, you believe the defendant to be guilty of murder in the first degree, could you return such a verdict?
- A. Yes.
- Q. If, after all the evidence in this case and the law as his Honor, Judge Adams will give you, and as a member of this jury you believe that the death penalty is warranted, would you impose such a penalty?
- 9

A. Does that mean "capital punishment? I don't believe in that.

Q. That is the death penalty.

Q. Do you have a moral or religious belief against capital punishment?

A. I am a Baptist and I don't believe in capital punishment.

Q. Is it against your religious beliefs to support capital punishment?

A. Yes, it is.

MR. SOLOMON: Challenge for cause.

MR. WHITEKO: I would object to the challenge based on her answer.

JUDGE ADAMS: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. I would overrule the objection.....

(See petitioner's A--143-144). (emphasis supplied by the respondent).

The trial court adequately explained the exclusion of Juror Number 102

(See petitioner's A--122-123):

This court, as to Juror Number 102-Hattie M. Royster-had no difficulty in reaching the decision in that her attitude and manner as well as her words, indicated that she had personal and religious beliefs which prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that court's dismissal for cause was abrupt, and that more extensive questioning would have placed and Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and was properly excluded from the jury for cause.

The Pennsylvania Supreme Court properly held that the record indicated that Juror Number 102 could not carry out her duty to follow the law as the trial court instructed and, therefore, was properly excluded (See Petitioner's A--15-17). The respondent respectfully submits that the Pennsylvania State Courts' determination was proper.

A determination of whether to disqualify a prospective juror is made by the trial judge based on both that juror's answers as well as demeanor, and will not be reversed absent a palpable abuse of discretion. Commonwealth v. DeHart, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), cert. denied, ____ U.S. ____, 107 S.Ct. 3241 (1987). (emphasis supplied).

The only relevant inquiry in making such a determination is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." Wainwright v. Witt, 469 U.S. 412 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980). It must be noted that a state can remove those jurors who would

"frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Witt, 469 U.S. at 423. The record in the case at bar clearly indicates that Juror Number 102 could not temporarily set aside her own beliefs in deference to the rule of law. See Lockhart v. McCree, 476 U.S. 162 (1986). Any further inquiry in this regard was unnecessary.

This Court, in Witt, 469 U.S. at 426, noted that there will be situations where a trial judge is left with definite impressions that a prospective juror would be unable to faithfully and impartially apply the law. This is why deference must be paid to the trial judge who see and hears the juror. Further, this Court, in Witt, found that a state court's determination to excuse a juror for cause was finding of fact and was therefore subject to a presumption of correctness accorded by 28 U.S.C. Section 2254 (d) to state court findings of fact in federal habeas corpus proceedings. Id. See Patton v. Yount, 467 U.S. 1025 (1984).

The petitioner in the within case also relies on Gray v. Mississippi, ____ U.S. ____, 107 S. Ct. 2045 (1987), to support his position relative to this issue. This reliance is misplaced. In Gray, this Court considered a trial court's exclusion for cause a juror who, although initially expressing conscientious scruples against the death penalty, ultimately stated that she could consider the death penalty in an appropriate case. As demonstrated by the record, the facts and issues in Gray are clearly distinguishable from the case sub judice. Based upon the facts and authority cited herein, the Petition for Writ of Certiorari must be denied.

II.

The Pennsylvania death penalty statute is not unconstitutional, despite its mandatory language, because adequate safeguards are contained therein. The relevant portion of the statute to this issue is: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance...and no mitigating circumstances...", 42 Pa. C.S.A. Section 9711 (c) (1) (iv). The authority cited by petitioner, primarily Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, ____ U.S. ____, 107 S. Ct. 1821 (1987), involve the issue of considering any relevant "mitigating circumstances" when making such a determination. In the case sub judice, no "mitigating circumstances" were presented by the petitioner.

In the absence of same, and having found the petitioner guilty of robbery and a concomitant homicide, the jury properly sentenced the petitioner to death.

The argument set forth by the petitioner herein was expressly refuted in Commonwealth v. Peterkin, 511 Pa. 299, 326-328, 513 A.2d 373, 387-388 (1986), cert denied, ____ U.S. ____, 107 S.Ct. 962 (1987). The Pennsylvania Supreme Court, in Peterkin, held that

"(a)lthough it is true that the Pennsylvania death penalty statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, the statute permits the defendant to introduce a broad range of mitigating evidence (42 Pa. C.S.A. Section 9711 (e)) that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstances (42 Pa. C.S.A. Section 9711 (d)) found by the jury. Appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of mitigating circumstances. The channelling of considerations of mercy and leniency into the scheme of aggravating and mitigating circumstances is consistent with the mandate of Furman v. Georgia, 408 U.S. 238 (1972), reh. denied, 409 U.S. 902 (1972), that the discretion of the sentencing body in capital cases "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976), reh. denied, 429 U.S. 875 (1976).

....Lockett v. Ohio, 438 U.S. 566 (1978), does not require that the sentencing body be given discretion to grant mercy or leniency based upon unarticulable reasons. Lockett holds "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., 438 U.S. at 604. (emphasis in original). The Pennsylvania statute (42 Pa. C.S.A. Section 9711 (e)(8)) clearly permits consideration of such evidence.... Thus, we find no merit to appellant's constitutional challenges to the Pennsylvania death penalty statute."

It must be noted that the Pennsylvania death penalty statute requires that a jury's decision in rendering a death sentence be unanimous, and if a unanimous verdict cannot be reached with regard to same, a court must then sentence the defendant to life imprisonment. See 42 Pa. C.S.A. Sections 971 (c) (1) (iv) and 9711 (e) (1) (v). Also, 42 Pa. C.S.A. Section 9711 (h) (1) provides that a death sentence is automatically reviewed by the

Pennsylvania Supreme Court. It is because of these provisions of the Pennsylvania death penalty statute, as recited hereinabove, that "(j)ury discretion is thus neither eliminated, nor unduly limited, but rather is channeled in order to ensure that the death penalty will be imposed in a consistent and rational, as opposed to an arbitrary and capricious, manner" (See petitioner's A---134-135). See Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970 (1983), reh. denied, 463 U.S. 1236 (1983).

Based upon the facts and authority cited herein, the Petition for a Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Russell B. Korner, Jr.

RUSSELL B. KORNER, JR.,
Assistant District Attorney
for the County of Fayette,
Commonwealth of Pennsylvania

Office of the District Attorney
Fayette County Courthouse
61 East Main Street
Uniontown, Pennsylvania 15401
(412) 438-4521
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, RUSSELL B. KORNER, JR., Esquire, being a duly admitted member of the Bar of this Court, hereby certify that a copy of the Brief In Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, was served on petitioner's counsel, Samuel J. Davis, Esquire, and John M. Purcell, Esquire, Davis and Davis, 107 East Main Street, Uniontown, Pa. 15401, on March 3, 1989, by personal service.

Respectfully submitted,

Russell B. Korner, Jr.

RUSSELL B. KORNER, JR.,
Assistant District Attorney
for the County of Fayette
Commonwealth of Pennsylvania

Office of the District Attorney
Fayette County Courthouse
61 East Main Street
Uniontown, Pennsylvania 15401
(412) 438-4521
COUNSEL FOR RESPONDENT

DATE: March 3, 1989

(5)
No. 88-6222

Supreme Court, U.S.

FILED

MAY 26 1989

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SCOTT WAYNE BLYSTONE,
Petitioner,

v.

PENNSYLVANIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Pennsylvania

JOINT APPENDIX

SAMUEL J. DAVIS
JOHN M. PURCELL
DAVIS & DAVIS
107 East Main Street
Uniontown, PA 15401
(412) 437-2799
Counsel for Petitioner

RUSSELL B. KORNER, JR.
Fayette District Attorneys Office
Fayette County Courthouse
Uniontown, PA 15401
(412) 438-4521
Counsel for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 16, 1988
CERTIORARI GRANTED MARCH 27, 1989

1528

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Portion of Trial Record in this case containing sentencing proceedings	2
Portion of Trial Record in this case containing counsel's closing arguments in penalty proceedings	22
Opinion of the Court of Common Pleas of Fayette County, Pennsylvania, Dated April 17, 1986	27
Opinion and Judgment of the Supreme Court of Pennsylvania, Dated October 17, 1988	94
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 27, 1989	150

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

February 13, 1984—Criminal information filed.

June 13, 1984—Verdict of guilty of first degree murder returned by jury.

June 13, 1984—Verdict of sentence of death returned by the jury.

April 17, 1986—Defendant formally sentenced by Judge Fred C. Adams of the Court of Common Pleas of Fayette County, Pennsylvania.

October 17, 1988—Opinion and Judgment of the Supreme Court of Pennsylvania affirming the Petitioner's conviction and sentence of death.

IN THE COURT OF COMMON PLEAS
OF FAYETTE COUNTY PENNSYLVANIA

No. 2 of 1984

COMMONWEALTH

v.

SCOTT WAYNE BLYSTONE

* * *

JUDGE ADAMS: We would address this to the foreman of the jury, Mr. Paul Davis: You have heard the verdicts read in this case. As they were read are they the verdicts which you entered upon the verdict slips and which you signed as foreman?

MR. PAUL DAVIS, FOREMAN: Yes, sir.

JUDGE ADAMS: Very well. Members of the Jury, you need not stand as you respond. The Clerk will poll the jury. As each of your names are called and each offense is read, you are to respond how you voted, whether it be guilty or not guilty. You may poll the jury.

ALL TWELVE JURORS WERE POLLED AND EACH JUROR ANSWERED "GUILTY" TO EACH CHARGE AS READ BY THE CLERK.

CLERK: And so say you all.

JUDGE ADAMS: Members of the Jury, where you have made a finding of murder in the first degree, it is necessary that the Court now have a second hearing in which testimony will be offered, following which you need to determine the penalty to be imposed in this case, whether it be life in prison or death by execution. The

second hearing will have nothing to do with the question of innocence or guilt. That has been determined, but in homicide cases of the first degree, that is the only type of case where the jury determines what the penalty will be. As I told you, it will be either life in prison or death. Before we start this hearing, I am going to excuse you for lunch and ask you that during your lunch period you are not to discuss the case in any manner. Wait until you have heard the second testimony and I have charged you concerning the imposition of the penalty. At that time you are to decide, on the circumstances as you find them to be, what penalty should be imposed. We would excuse you for lunch at this time. Counsel is to remain.

JURORS LEAVE COURTROOM

JUDGE ADAMS: I would like to see counsel in chambers please.

CONFERENCE IN CHAMBERS OFF THE RECORD.

6/13/84—1:45 p.m.

THE FOLLOWING TOOK PLACE IN THE ABSENCE OF THE JURY:

MR. WHITEKO: Your Honor, after lengthy discussions with Mr. Blystone and over my strenuous objection, he states that he wishes to offer no evidence. I have talked to his parents and interviewed them on several occasions and I wish to put them on the stand and I wish to put Mr. Blystone on the stand, but after trying for two hours there has been no progress.

JUDGE ADAMS: Mr. Blystone, by virtue of the statement of your attorney, it is necessary that I explain to you what is involved here to make sure that you fully understand all of your rights and the effect of the decision you have made. Once the jury has made a determination of innocence or guilt and found you guilty of first degree, this is the only occasion in our law in Pennsylvania where the jury determines the penalty. The jury would have to determine whether your penalty would be life imprisonment for the homicide or death by the elec-

tric chlar. I would have to instruct them that if they find an aggravating circumstance and no mitigating circumstances, they must impose the death penalty. I would also have to tell them that if they found the homicide occurred during the commission of the felony of robbery, that is an aggravating circumstance, and if they believed beyond a reasonable doubt that this death occurred during a robbery, that would be aggravating and they must impose the death penalty unless the defense would come forth with what are called mitigating circumstances. Mitigating circumstances would be, under our law, that you had no significant history of prior criminal convictions, that you were under the influence of extreme mental or emotional disturbance, that your capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of law was substantially impaired, your age, that you acted under extreme duress or under the substantial domination of another person, that the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts, that your participation was relatively minor, or any other mitigating matter concerning your character or record or the circumstances of this offense. As the Commonwealth has the burden of proving beyond a reasonable doubt the aggravating circumstances, the defense has the burden of proving the mitigating circumstances, and that burden of proof is by what is called a preponderance of the evidence. Your burden of establishing mitigating circumstances is not as great as that of the Commonwealth. To establish mitigating circumstances you must prove them by a fair preponderance, which is simply that the evidence on one side is greater than the evidence on the other; that is, it is more believable on the one side than the other. If you do not present any testimony, then your attorney would have to rely entirely upon the evidence which is presently before the jury and then argue to the jury whether or not they should impose the death penalty. You have an absolute right to remain silent and I

cannot require you to testify nor can I require you to put any witnesses on the stand to testify on your behalf, but I would strongly ask you to consider the effect of your failure to offer any testimony. You have to decide whether the testimony that was offered here would affect the outcome of this case—whether it would be favorable or unfavorable to you. I will tell the jury they should not consider the fact that you did not testify or that you did not offer any evidence in mitigation and that their verdict cannot be based on that fact, but if you do not give the many evidence then you give them very little to consider from the standpoint of mitigation. Your decision here will be absolutely final and if you elect not to offer any testimony and they would return the death penalty, you will not be entitled to a new trial or a reconsideration of the death penalty based on the fact that you did not offer any testimony. You are represented by counsel, and your counsel has stated that he has strongly recommended to you that you do offer testimony in whatever nature he sees fit or you see fit, but as I stated, the decision has to be yours. Your counsel can recommend but he cannot require you to offer testimony. I would ask you, Mr. Blystone, do you understand what I have explained to you?

MR. BLYSTONE: Could I have a minute, your Honor?

JUDGE ADAMS: I am sorry—I didn't hear you.

MR. BLYSTONE: Could I have a minute to talk to my lawyer?

JUDGE ADAMS: I can't hear you.

MR. WHITEKO: He wishes to speak to me now, your Honor.

JUDGE ADAMS: Fine. You may do so.

MR. BLYSTONE CONFERS WITH COUNSEL.

MR. WHITEKO: Your Honor, one question he has—when you stated "appeal on the death penalty," he wants to know if he loses all his rights, and I have explained to him that he doesn't.

JUDGE ADAMS: He does not. The only thing is, you would not have the right to appeal on the grounds that you had no opportunity to offer testimony. You would have the right to appeal that there was no basis for the imposition of the death penalty based on what was before the jury because you have no burden to go forth to prove anything, even during this proceeding, except mitigating circumstances, so the Commonwealth would still have the burden of proving the existence of aggravating circumstances even if the jury found that there were no mitigating circumstances. What I am saying is, your offering testimony or not offering testimony does not lessen the Commonwealth's burden to prove aggravating circumstances beyond a reasonable doubt. The imposition of the penalty, based on whether you testify or not, would have—I am sorry, whether you testified or not would have nothing to do with your right to take an appeal from the conviction of first degree murder or whatever imposition the jury might make. I am simply stating to you that the Court is giving you the opportunity to present whatever evidence you wish in mitigation of the sentence. If you fail to accept that opportunity and you do not offer any testimony, you could not later appeal on the basis that you did not offer any testimony or were not given the opportunity to do so. Does that answer the question for you?

MR. BLYSTONE: Yes, I understand.

JUDGE ADAMS: Do you have any other questions of me?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case? You had better think very carefully before you answer that question. I would tell you that I am not insisting that you testify—don't misunderstand me—because whatever decision you make I am going to abide by, but I just want to make sure that you fully understand what you are doing because tomorrow you

cannot change your mind. I would ask you to consult one more time with your attorney and then after consulting, tell me what you want to do and we will respect your wishes.

MR. BLYSTONE CONFERS WITH COUNSEL

JUDGE ADAMS: What is your decision, Mr. Blystone?

MR. BLYSTONE: I have no testimony and no witnesses.

JUDGE ADAMS: Either through yourself or anyone else?

MR. BLYSTONE: No.

JUDGE ADAMS: May I see counsel at sidebar please?

SIDEBAR CONFERENCE OFF THE RECORD.

JUDGE ADAMS: Let the record indicate that the Court has interrogated the defendant, Scott Wayne Blystone, and the Court is of the opinion that he is an intelligent man who understands what I have explained to him, and that the decision he has made was made after careful consideration. I have consulted with his counsel who is also of the opinion that he understands the decision he has made and that he understands the possible consequences of that decision. Is that correct, Mr. Whiteko?

MR. WHITEKO: Yes, your Honor. I have tried to explain to him that I wish for him to take the stand, or his parents, and explained the consequences and he has refused.

JUDGE ADAMS: And you have advised him that he should, is that correct?

MR. WHITEKO: Yes, I have.

JUDGE ADAMS: Very well. Mr. Whiteko has asked for some additional time before proceeding, so we will adjourn and reconvene at 2:30. Anne, please advise the jury that we will not start until 2:30.

6/13/84—2:30 p.m.

THE FOLLOWING TOOK PLACE IN THE ABSENCE OF THE JURY:

JUDGE ADAMS: Mr. Whiteko, there are several more questions I feel I must direct to the defendant before we call in the jury. Mr. Blystone, are you taking any narcotic or medication of any kind that might affect your reasoning?

MR. BLYSTONE: No, I am not.

JUDGE ADAMS: Can you state for the record why it is that you do not want to offer any testimony?

MR. BLYSTONE: I don't want anybody brought into it.

JUDGE ADAMS: I am sorry—I can't hear you.

MR. BLYSTONE: I don't want anybody else brought into it.

JUDGE ADAMS: What did he say?

MR. WHITEKO: He doesn't want anybody else brought into this matter, your Honor.

JUDGE ADAMS: Is that your only reason for not offering any testimony?

DEFENDANT SHAKES HIS HEAD "YES."

JUDGE ADAMS: Of course, if you testify yourself that would not be bringing anyone into it except yourself, do you understand?

MR. BLYSTONE: Uh-huh.

JUDGE ADAMS: Very well. Would counsel approach the bench please.

SIDEBAR CONFERENCE OFF THE RECORD.

JUDGE ADAMS: You may bring in the jury.

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

JUDGE ADAMS: Members of the Jury, you have found the defendant guilty of murder in the first degree and your verdict has been so recorded. We are now going to hold a sentencing hearing during which counsel may present additional evidence and arguments and then you will decide whether the defendant is to be sentenced to

death or life imprisonment. Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances there are in this case. Generally speaking, aggravating and mitigating circumstances are circumstances concerning the killing and the killer which makes a first degree murder case either more serious or less serious. The Crimes Code defines more precisely what constitutes aggravating and mitigating circumstances. I will give you detailed instructions later in this hearing as to what constitutes an aggravating circumstance and what constitutes a mitigating circumstance, but we would tell you at this time that aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt as I explained reasonable doubt to you during the charge. While mitigating circumstances must be proven by the defendant, the burden of proof is of a lesser degree. It is only by a fair preponderance or by a preponderance of the evidence, which simply means that it exceeds in weight. Is the Commonwealth prepared to proceed?

MR. SOLOMON: If the Court please, the Commonwealth is prepared to present testimony regarding the aggravating circumstance that the defendant committed a killing while in the perpetration of a felony, and the felony would be robbery that was committed on Dalton Charles Smithburger. If the Commonwealth were to call witnesses, the Commonwealth would call Barbara Clark, Jackie Guthrie, Miles Miller, and Trooper Teagarden to play the tape of the conversation between Miles Miller and Scott Blystone. Since that testimony has already presented to this jury, to present the same testimony would merely be a reiteration of that testimony. The Commonwealth would rely upon the recollection of the jury regarding that testimony and they would not need to carry any further witnesses at this time, your Honor.

JUDGE ADAMS: Very well. Does the defense wish to offer any evidence or testimony?

MR. WHITEKO: Your Honor, we don't wish to offer any additional testimony at this time?

JUDGE ADAMS: Is that your decision, Mr. Blystone?

MR. BLYSTONE: Yes, it is.

JUDGE ADAMS: Mr. Whiteko, it is my understanding that you are not offering any testimony either from the defendant or from anyone else, is that correct?

MR. WHITEKO: Yes, your Honor, that is correct.

JUDGE ADAMS: Members of the Jury, as I told you earlier, the defendant has an absolute right during the trial of this case to remain silent. He has no duty to offer testimony during the trial of the case. He also has that same right during a sentencing hearing such as we have here. He has an absolute right not to offer any testimony either through himself personally or through other witnesses. The same standard that I told you applied in the trial of this case also applies in the sentencing aspect of this case. The fact that the defendant elects not to offer any testimony is not of itself any indication of the penalty you might wish to impose. The Commonwealth still has the burden of proving the aggravating circumstance beyond a reasonable doubt whether he offers anything or not. You would also have the obligation, even though no testimony is offered during this proceeding, to determine from all of the testimony—that is, what you heard during the trial of the case—whether or not there are aggravating circumstances or whether or not there are mitigating circumstances. Is there anything which counsel for the Commonwealth would wish to present to the jury before argument on the penalty?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Is there anything further which the defense would wish to present before argument to the jury on the penalty?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: We would first hear from the Commonwealth.

MR. SOLOMON: Thank you, your Honor.

ARGUMENT BY MR. SOLOMON.

JUDGE ADAMS: Mr. Whiteko.

ARGUMENT BY MR. WHITEKO.

JUDGE ADAMS: Members of the Jury, the Court will now instruct you as to the standard you are to apply in reaching your determination. As I told you earlier, you may consider all the testimony that you heard. You may consider anything that you heard or found believable in the first trial. During that period of time you heard testimony concerning the commission of a robbery. You made a finding of guilty on that charge. You made a finding of guilty on the charge of criminal homicide. If you find that the killing occurred in the commission of that robbery, that is an aggravating circumstance. You would need to find beyond a reasonable doubt that the killing occurred in the perpetration of that robbery. If you so find, that would be an aggravating circumstance. The Crimes Code defines what are aggravating and mitigating circumstances,—for example, the victim was a fireman, police officer or public servant concerned in official detention who was killed in the performance of his duties. Of course, that is not applicable here so I am not going to give you the aggravating circumstances that are not applicable—only that which is, and there is only one aggravating circumstance that you find, and that is that the killing occurred in the commission of the felony or robbery, if you find this occurred beyond a reasonable doubt. If you find that there is an aggravating circumstance, and you must unanimously find it, you would then need to determine if there were any mitigating circumstances, which I will explain to you. If you find an aggravating circumstance and no mitigating circumstances, it is your duty to return a verdict of death. If you find that there are mitigating

circumstances, then you would need to determine whether the aggravating circumstance or aggravating circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty. If you find no aggravating circumstances, you must return the penalty of life imprisonment, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you must return life imprisonment. The Crimes Code provides that the following matters, if proven, constitute mitigating circumstances. I am going to read to you everything under the Crimes Code that you might consider as a mitigating circumstance. In order to consider them, you would have to find evidence that would justify the finding of mitigating circumstances. As I said to you, that finding of mitigating is not the same standard. It is just if you find that the evidence of mitigation is greater than the other way by a preponderance of the evidence, which means simply to exceed in weight, and then you would make a finding of mitigating. These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; and any other mitigating matter concerning the character or record of

the defendant, or the circumstances of his offense. I am going to repeat those to you, and as I told you, they are only applicable if proven by a fair preponderance of the evidence: The defendant had no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; whether the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal act was relatively minor, and any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. If any of you would want any further instructions as to what constitutes aggravating circumstances or mitigating circumstances, raise your hand. (no response). As I told you, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. All of the evidence from both sides, including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances, is important and proper for you to consider. You should not decide out of any feeling of vengeance or prejudice toward the defendant. As I told you earlier, which I am going to stress again, that it is entirely up to the defendant whether to testify or to offer any evidence, and you must not draw any adverse inference from his silence or the fact that he elected not to present any evidence. The verdict is for you, Members of the Jury, to decide. Remember and consider all of the evidence, giving it the weight to which

it is entitled. I want you to understand that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. In order for you to return a verdict of death, all twelve of you must unanimously agree upon that verdict. Your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases your verdict must be a sentence of life imprisonment. You will be given a special verdict slip applicable to this decision you need to make. It will differ from the verdict slip which I previously gave to you. Under the first paragraph it reads: "We, the jury, unanimously sentence the defendant to . . ."—there is typed the word "death" or the words "life imprisonment." Depending upon the determination you make, you will enter a checkmark opposite "death" or opposite "life imprisonment." If you find "life imprisonment" you need go no further with your verdict slip. Have the foreman that you select sign the verdict slip and return it to the Courtroom. If you find the death penalty is to be imposed, you would need to go to the second paragraph which says: "We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstances." If you would find that to be the case, you would have checked the death penalty on number one and you would have checked in the space opposite what I just read you under paragraph two. If you find that there are aggravating circumstances and also mitigating circumstances, you would then go to the next paragraph which says: "We, the jury, have found unanimously one or more aggravating circumstances which outweigh any mitigating circumstances." Repeating what you would do—you would

first make the determination of whether the sentence is death or life imprisonment. If you decide it is life imprisonment, you would go no further. Just simply have the foreman sign the verdict slip and return to the Courtroom. If you find that death is to be imposed, then you would need to show whether you found aggravating circumstances and no mitigating circumstances. That would be paragraph two. If you found an aggravating circumstance and no mitigating, you go no further. Just check that block and sign it. If you find that there were both aggravating and mitigating, you would not check the second block but go to the third and check that the aggravating circumstances outweigh the mitigating. I told you on the other verdict slips that you were to make no comment on the verdict slips except the finding of guilty or not guilty. That is not the case on this verdict slip. If you find that there is an aggravating circumstance, you would write on the verdict slip what that aggravating circumstance was. In this case there is only one aggravating circumstance that you could find and that is that the death occurred in the commission of a robbery. If you find beyond a reasonable doubt that that is an aggravating circumstance which would outweigh the mitigating, then you would write that on the verdict slip. Does any juror wish any further explanation on how you would deal with the verdict slip? (no response). I think when you read it that it will be self-explanatory, at least I hope that it will, but I would stress to you that you must write on it, that is the foreman must write on it what the aggravating circumstance you found was. As I stated to you, your verdict must be unanimous in this case to impose the death penalty. If, after conscientious and thorough deliberations, you are unable to agree on your findings and verdict, you should report that to the Court. If in my opinion further deliberations would not result in a unanimous agreement of the sentence, it would be my duty then to sentence the defendant to life

imprisonment. What I am telling you, if you do not unanimously agree on the death penalty, then the sentence imposed would be that of life imprisonment. Would counsel for the Commonwealth wish any additional correction or clarification of the charge?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Does any Member of the Jury wish any additional clarification of the charge or the verdict slip? (no response). Members of the Jury, you have one of the most solemn duties ever to be imposed on anyone. You must sit in judgment of a person and determine whether they should be sentenced to life or death. You have a sworn duty to take the law as the Court gives it to you and follow that duty in accordance with the instructions I have given you. You may now retire and consider your verdict.

JURY RETIRED AT 3:10 p.m.

AT 3:46 p.m. the jury returned to the Courtroom with a question, and the colloquy is as follows:

JUDGE ADAMS: Mr. Foreman, do you have a question?

FOREMAN OF THE JURY: We would like you to repeat what constitutes a mitigating circumstance.

JUDGE ADAMS: All right. The Legislature has determined what constitutes mitigating circumstances. I am going to read to you those things that you could consider but you are only to consider them if there is evidence that would cause you to believe that they exist. For purposes of this case, the following matters, if proven, can constitute mitigating circumstances: The defendant has no significant history of prior criminal convictions; the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or ad-

vanced age of the defendant at the time of the crime; whether the defendant acted under duress, extreme duress, or acted under the substantial domination of another person—now, this would be duress from some other source; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; the defendant's participation in the homicidal act was relatively minor; and the last catch-all—any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense. The first seven are the specific matters you could consider. The last is the catch-all—any other mitigating circumstances that result from the character or record of the defendant or the circumstances of the case. It would be your duty to consider these types of mitigating circumstances and if there is evidence from which you can make a finding that they existed, you would consider them but if there is no evidence concerning them at all, of course there is then nothing for you to consider in determining whether or not that is a mitigating circumstance. Mr. Foreman, as far as you are concerned, do you think that answers your question personally?

FOREMAN: Yes.

JUDGE ADAMS: Now, does any other Member of the Jury have any question concerning aggravating or mitigating?

JUROR: The last line—any other mitigating circumstances. Would you explain that.

JUDGE ADAMS: It states "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." This is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance, but it should be, in determining it, something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense. If you find anything in these that you consider to be mitigating, you might consider them, and

then you would weigh whatever you found to be mitigating against whatever you found to be aggravating, if you found aggravating. If the mitigating outweighs the aggravating, it must be life imprisonment. If the aggravating outweighs the mitigating, then it must be death. Does that answer your question?

JUROR: Yes, sir.

JUDGE ADAMS: Does any other juror have any other question?

NO RESPONSE

JUDGE ADAMS: Does the Commonwealth wish me to make any further instruction or clarification?

MR. SOLOMON: No, your Honor, thank you.

JUDGE ADAMS: Would the defense?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: Very well. You may retire and continue your deliberations.

JURY RETIRED AT 3:50 p.m.

6/14/84—10:00 a.m.

The following took place in Courtroom number 1 in the presence of Judge Adams, Mr. Solomon, Mr. Whiteko, Scott Wayne Blystone, Wanda Budner of the Clerk of Court's Office, and the court reporter:

JUDGE ADAMS: It was called to the Court's attention after the jury had been discharged that inadvertently the stenographer was not in the Courtroom to record the taking of the verdict of sentence nor was the stenographer present when I gave the defendant his rights, so it is going to be necessary that I repeat the rights so they are on the record and that we establish on the record what took place yesterday. We would at this time ask the clerk for the record to state her name and her occupation.

MRS. BUDNER: My name is Wanda Budner and I am a clerk in the Clerk of Court's Office.

JUDGE ADAMS: Were you the clerk that took the verdict of sentence following the conviction of the first degree homicide as determined by the jury?

MRS. BUDNER: Yes, I was.

JUDGE ADAMS: For the record will you read what that verdict was.

MRS. BUDNER: We, the jury, unanimously sentence the defendant to death. We, the jury, have found unanimously at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance—death resulted during commission of a robbery.

JUDGE ADAMS: Was this verdict read in open court?

MRS. BUDNER: Yes, sir, it was.

JUDGE ADAMS: Following its reading in open court—first, what was the name of the foreman of the jury?

MRS. BUDNER: Paul Davis.

JUDGE ADAMS: Did Paul Davis state in open court that the verdict as recorded was the verdict as he entered it on the verdict slip and signed it?

MRS. BUDNER: Yes, he did.

JUDGE ADAMS: Following that was the jury polled?

MRS. BUDNER: Yes, it was.

JUDGE ADAMS: And as a result of the poll what did the jury—what was the result of the poll?

MRS. BUDNER: It was affirmative.

JUDGE ADAMS: By all jurors?

MRS. BUDNER: By all jurors.

JUDGE ADAMS: Thank you. Mr. Solomon, you have heard the statement of the Clerk as to what took place at that proceeding. Were you present during the time that the sentencing verdict was read?

MR. SOLOMON: I was, your Honor.

JUDGE ADAMS: And as stated by the Clerk, do you recall it in that fashion?

MR. SOLOMON: Your Honor, I recall the verdict being read by the Clerk, I recall your Honor asking the

foreman of the jury, Mr. Davis, as to whether or not the verdict as read was as he recorded it and he answered in the affirmative. I then recall the Court instructing the Clerk to poll the jury, at which point the jurors were polled individually by the Clerk and each answered in the affirmative that the verdict as read was as they voted.

JUDGE ADAMS: Mr. Whiteko, do you have any different recollection?

MR. WHITEKO: No, your Honor.

JUDGE ADAMS: As stated here, as far as you are concerned, was this what happened yesterday?

MR. WHITEKO: Yes, your Honor.

JUDGE ADAMS: Mr. Blystone, do you have any different recollection as to what occurred?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Mr. Blystone, I have to give you your rights again even though I did give them to you once, so that they will be on the record. The Court wishes to advise you that where you have been found guilty by a jury with regard to the charge of robbery, conspiracy to commit homicide, conspiracy to commit robbery, and murder in the first degree, that you have a right to file a motion for arrest of judgment within ten days of the date of the verdict on grounds of error appearing on the face of the record or that the evidence is insufficient to sustain the charge or that the Court does not have jurisdiction. If the Court should rule favorably on such motion, the charge would be dismissed and you would be discharged. You have a right to file a motion for a new trial within ten days of the date of the verdict on grounds of trial errors prejudicial to you, or that the verdict was against the weight of the evidence, or for such other reason as you may have. If the Court would rule favorably on such motion a new trial will be granted. If the Court should refuse your motion for arrest of judgment or motion for new trial, you have a right to appeal to a Higher Court on any issues raised by such motions. We wish to advise you, however, that the

Higher Court will not consider any issue that is not raised by your motion for new trial or motion for arrest of judgment. If the Higher Court should rule favorably on your motions, you would either be discharged or granted a new trial, as the case may be. You are represented by Mr. Whiteko of the Public Defender's Office who will assist you in preparing any motions you wish to file. You of course have the right to private counsel if you can afford the services of private counsel. The Court appointed counsel, that is the Public Defender, will continue to serve and represent you free of charge, not only with respect to the filing of the motions but all proceedings, including appeal to the Higher Court on any issues raised by such motions. Any action you desire to take with regard to filing any motions should be done immediately and in any event must be done within ten days of the date of the verdict. If such motions are not filed or are filed and voluntarily withdrawn by you as they relate to the charges of robbery, conspiracy to commit robbery, and conspiracy to commit criminal homicide, the legal effect would be that the verdicts would stand and you would be waiving, that is giving up, your right to file such motions and appealed to a Higher Court. On the issue of the imposition of the death penalty, you have an automatic right to appeal to the Supreme Court. This Court is not urging or discouraging the filing of any such motions by you, nor is the Court indicating how it would rule on any such motions. The Court is merely advising you of your legal rights. Do you understand, Mr. Blystone, what I have explained to you?

MR. BLYSTONE: Yes, I do.

JUDGE ADAMS: Do you have any question of me at all?

MR. BLYSTONE: No, your Honor.

JUDGE ADAMS: Very well. This Court is adjourned.

.

IN THE COURT OF COMMON PLEAS
OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

(Title Omitted in Printing)

CLOSING ARGUMENTS OF GERALD R. SOLOMON AND
JEFFREY W. WHITEKO WITH REGARD TO THE
PENALTY TO BE IMPOSED BY THE JURY AFTER THE
JURY HAD RETURNED A FIRST DEGREE VERDICT

6/13/84

[1] MR. SOLOMON: May it please this most Honorable Court, Mr. Whiteko, and Ladies and Gentlemen of the Jury. As Members of this Jury and having found the defendant guilty of murder in the first degree, you now face a solemn and serious decision, whether the defendant shall receive life in prison or shall receive the death penalty. If anyone thinks that I enjoy, or the Commonwealth enjoys coming before you and asking for the death penalty, they have another thought coming. It is much, much easier to represent the Commonwealth in a non-capital, non-serious case, but it is my duty, as the District Attorney of Fayette County, to come before you and to represent the Commonwealth to the best of my ability, and it is your duty as jurors, your sworn duty, to follow the law and to apply that law to this case. You did that earlier in returning your verdict and I am sure you will do it when you retire to deliberate the penalty. As before, you must follow the law as his Honor, Judge Adams, will give it to you to determine what the penalty should be. Our law doesn't permit the jury to impose the death penalty or impose a life sentence as they feel it should be, but rather there are certain specific times

when the death penalty should be imposed and there are certain specific times when it should not be imposed. The court touched upon it and told you of aggravating and mitigating circumstances. The aggravating circumstance in this case is that this defendant committed a felony—excuse me—committed a killing in the perpetration of a felony. The felony in this case was the robbery. You have already made a determination by your verdict that this defendant [2] was guilty of that robbery, so you have the aggravating circumstance. It is already proven and you already believed it. Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty; so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it. The Commonwealth would admit to you that somewhere—somewhere in his life this defendant, for whatever reason, decided that human life wasn't very valuable, decided that taking a human life was like any other act. People pray at night—you wish during your life that you will live to a ripe old age and die a peaceful death—a nice, peaceful death—and the thought of having six shots fired in the back of your head is something that none of us want to think about. Animals—lowly animals—fight desperately for their lives. No one wants to throw away life. Somewhere in his life, Scott Blystone decided that human life has no more value than \$13.00. I would ask that each of you listen closely to the instructions the Court gives you. There is no doubt that there is an aggravating circumstance that is present. You must determine from the evidence presented in this Courtroom whether or not

there are any mitigating circumstances; if not, you must follow the law and impose the death penalty. Once again, as in [3] the initial proceedings where you determined guilt or innocence, you cannot be guided by sympathy for the defendant or the victim. You must follow the law and I am confident that you will. Thank you very much.

JUDGE ADAMS: Mr. Whiteko.

MR. WHITEKO: Judge Adams, Mr. Solomon, Trooper Goodwin—Ladies and Gentlemen of the Jury, good afternoon. I spent a troubled evening last night thinking about the possibility of this going to this stage, and I was going to argue to you many, many points concerning what my reasons were against the death penalty as a lawyer, and I started writing them all down, had the Legislative Journal, was going to state to you how it is not a deterrent, how statistics prove that people still shoot people, and that the death penalty doesn't warrant the reasons that are going to be put forth, but ladies and gentlemen of the jury, I am not going to do that. I am not going to tell you that I am not begging you for your mercy. I am going to beg. Excuse me if I ramble and babble, but I am going to tell you that we are talking about a twenty-eight year old man, an intelligent man. He is young and there is still a possibility—years down the road possibly—to help develop this person. What happened that night to Dalton Smith-burger is a tragedy, but it would be an equal tragedy to take another man's life because we cannot change what happened that night. Now, the Legislature, as Judge Adams will tell you, stated that you are to put to death same persons in certain instances, and Mr. Solomon says that this is the instance when [4] you should put someone to death. Maybe Mr. Solomon is a better man than me because I don't know what—the Legislature doesn't really tell us—it lets it up to the twelve individuals to make that determination. I can't make that determination and no one else can except you twelve individuals who were chosen to hear this case. I don't want anyone

to take offense if at times I may quote the Bible, but remember that we may hate sin—"thou shalt not kill," but we can still love the sinner. We can still take this man into our hands and hope that at some point in his life he can be rehabilitated—try to understand his ways. Also, I would like to take a passage from Chapter 8 of the Book of John which deals with an adulteress, and they were going to stone the adulteress because of the commandment "thou shalt not commit adultery." They asked the Lord if this was a mockery, and the Lord told them "you who have not sinned cast the first stone." Everybody went away. Think of that. People make mistakes in their lives—some may be more serious than others, but that is not the question. The question is whether you want to place this person in the position where he will be put to death. Maybe one of the best examples of this particular instance in the most recent years was when the Pope was shot. He didn't say "kill that man." He said "put him away and pray for that man" and he forgave him. There was also Abel and Cain, who were brothers and one killed out of jealousy. God came down and spoke to the survivor. He didn't put him to death. He merely banished him for life on his own, and that is your determination today, Members of the Jury—banishment for [5] life, or death. Thank you.

.

IN THE COURT OF COMMON PLEAS
OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

(Title Omitted in Printing)

**CONVICTION—FIRST DEGREE HOMICIDE
SENTENCE OF THE JURY**

1. We, the jury, unanimously sentence the defendant to
☒ (X) Death
☐ () Life Imprisonment
2. We, the jury, have found unanimously
☒ (X) at least one aggravating circumstance and
no mitigating circumstance. The aggravat-
ing circumstance(s) (is) (are) :
Death resulted during commission of a
robbery.

Jury polled.

No. 12

/s/ Paul Davis
Foreman

IN THE COURT OF COMMON PLEAS
OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

(Title Omitted in Printing)

OPINION

ADAMS, J.

A Fayette County Criminal Court Jury found the defendant, Scott Wayne Blystone, guilty of the charges of murder in the first degree, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery.

Following the sentencing hearing, the jury unanimously sentenced the defendant to death.

Jeffrey W. Whiteko, trial counsel for the defendant, (hereafter referred to in this opinion as "trial counsel"), timely filed a motion for a new trial and motion in arrest of judgment.

Subsequently, the defendant maintained that trial counsel was ineffective at trial. Trial counsel, with the consent of the defendant, was permitted to withdraw, and the court, with the approval of the defendant, appointed Samuel J. Davis (hereafter referred to in this opinion as "post-trial counsel") to represent the defendant on all issues raised by the defendant, including ineffectiveness of trial counsel.

Trial counsel in his motion for new trial and motion in arrest of judgment alleged the following:

1. The trial judge erred in denying the defendant's motion to suppress communications and evidence since the

Commonwealth failed to establish probable cause to permit the wiretapping of defendant's conversation.

2. The District Attorney should not have permitted the wiretapping of defendant's conversation since it was not demonstrated that the informant was reliable.

3. The Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitution.

4. The District Attorney's Office should not have been permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

5. The defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

6. The informant's consent was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

7. The trial judge erred in not sequestering those jurors selected during voir dire since the case was highly publicized in the media.

8. The trial judge erred in not sequestering the jury during the trial because of the adverse trial publicity. Said adverse publicity was highly prejudicial against the defendant during his trial.

9. The publicity brought forth by the media during defendant's trial was highly prejudicial against the defendant.

10. The publicity concerning the trial of a co-defendant was highly prejudicial to the defendant.

11. The defendant's case was prejudiced when Commonwealth witness, Neil Christopher, referred to the .22 caliber handgun as the "murder weapon."

12. The defendant's case was highly prejudiced when Commonwealth witness, Jacqueline Guthrie, twice referred to defendant's criminal record.

13. The trial judge erred in permitting the Commonwealth to introduce into evidence a .22 caliber handgun since it failed to establish a chain of custody.

14. The verdict was against the weight of the evidence since the testimony of Jacqueline Guthrie and Barbara Clark were contradictory.

15. The verdict was against the weight of the evidence since the Commonwealth failed to prove the identity of the voice on the tape beyond a reasonable doubt.

16. The trial judge erred in permitting the media to stand directly behind the jurors during the playing of a tape.

17. A juror should not be challenged peremptorily by the Commonwealth simply because the juror is against the death penalty.

18. The death penalty is unconstitutional because it constitutes cruel and unusual punishment under the Eighth Amendment.

19. The trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances, although the defendant was against such a decision.

Defendant's post-trial counsel filed supplemental motions for new trial and motions in arrest of judgment setting forth the following reasons:

1. That the present situation does not present circumstances in which the death penalty is appropriate, and

its imposition shocks one's sense of justice, and said death penalty should be overruled by the trial court and a term of life imprisonment imposed.

2. That the defendant's right to a jury consisting of a fair cross-section of the community, as guaranteed by the United States and Pennsylvania Constitutions, was denied because the trial court allowed the prosecution to challenge for cause those potential jurors who had conscientious, moral or religious reservations about imposing the death penalty.

3. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to use a peremptory strike to eliminate the juror, Battaglini, from the jury after the defendant's challenge for cause as to said juror was denied.

4. That the jury's verdict of guilty on the robbery charge was against the evidence and the weight of the evidence in that insufficient evidence was presented regarding the taking of any of the victim's property.

5. The trial judge erred in failing to instruct the jury specifically that the corpus delicti of the crime of robbery must be made out by independent evidence aside from the defendant's admissions or confessions concerning said offense.

6. That the defendant was denied his right to effective assistance of counsel in that his trial counsel failed to object to the charge of the Court which neglected to clearly state the corpus delicti requirement for the charge of robbery.

7. That the evidence adduced at trial did not sufficiently prove the corpus delicti of the crime of robbery. Specifically, there was a lack of independent and substantial evidence concerning any theft of the victim's property.

8. That since the verdict of guilty on the robbery charge returned by the jury was erroneous, then the death

penalty was improperly imposed by the jury in that the robbery formed the sole aggravating circumstance found by the jury.

9. That the defendant was denied his right to effective assistance of counsel in that his trial counsel disregarded his specific instructions regarding the questioning of the prosecution witness, Jacqueline Guthrie.

10. That the defendant was denied effective assistance of counsel by trial counsel's failure to make a motion in limine to require the Court and prosecutor to caution all prosecution witnesses to avoid any mention of the defendant's prior record. Said failure resulted in three instances in which prosecution witnesses mentioned or implied that the defendant had been involved in prior criminal activity.

11. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's rights to privacy and self-incrimination guaranteed him by Article I, Section 8, of the Pennsylvania Constitution.

12. That the procedure by which the alleged conversation of the defendant was tape-recorded violated the defendant's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I—Section 1 of the Pennsylvania Constitution, and his right to be heard in a criminal prosecution secured by Article I, Section 9 of the Pennsylvania Constitution.

13. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to attempt to rehabilitate jurors who expressed reservations concerning the imposition of the death penalty.

14. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to call any

alibi witness on his behalf, despite his knowledge of the same.

15. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to properly investigate the existence and possible testimony of the defendant's alibi witnesses.

16. That the defendant was denied his right to effective assistance of counsel by trial counsel's failure to object and request a cautionary instruction when a witness mentioned or implied the existence of defendant's prior criminal record.

17. That the defendant was denied his constitutional right to a fair trial by the three references by two separate witnesses which mentioned or implied the existence of the defendant's prior criminal record. In addition, the defendant was denied his right to effective assistance of counsel by trial counsel's failure to move for a mistrial when the references to the defendant's prior criminal record were elicited before the jury.

18. That the trial judge erred in allowing the victim's father to testify concerning the victim's character, intelligence, and propensity to follow orders. Said testimony was irrelevant or in the alternative was so highly prejudicial to the defendant as to outweigh its slight relevance.

19. That the aggravating circumstance on which the jury based its death sentence finding is unconstitutional in that it is over-broad and bears no reasonable relationship to the determination of the appropriate penalty for defendant's conviction of first degree murder.

20. That the three references by two Commonwealth witnesses to the defendant's criminal record improperly tainted the death sentence determination by the jury.

21. That the trial court erred in denying the defendant's motion for an evidentiary hearing to present testi-

mony concerning the prosecution proneness of the jury that convicted him.

22. That the defendant was denied his constitutional right to effective assistance of counsel by his trial counsel's failure to raise any prosecution proneness objections at pretrial or during the trial of the case.

A hearing was held April 12, 1985 on the allegations of ineffectiveness of trial counsel. Several areas of ineffectiveness of trial counsel, not specifically enumerated in defendant's supplemental motion for new trial and motion in arrest of judgment were also raised.

The court will deal with each allegation and, where appropriate, combine those issues that are related.

1. THE VERDICTS OF GUILTY OF MURDER IN THE FIRST DEGREE WITH THE IMPOSITION OF THE DEATH PENALTY, ROBBERY, CONSPIRACY TO COMMIT MURDER, AND CONSPIRACY TO COMMIT ROBBERY WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The test of the sufficiency of the evidence is whether, after the Court has reviewed all of the evidence in the light most favorable to the Commonwealth and has drawn all reasonable inferences therefrom in favor of the Commonwealth, the evidence is sufficient in law to enable a jury to find each and every element of the crimes charged beyond a reasonable doubt. *Commonwealth vs. Carter*, 329 Pa. Super. 490, 495, 496, 478 A.2d 1286, 1288 (1984); *Commonwealth vs. Nelson*, 320 Pa. Super. 488, 491, 467 A.2d 638, 640 (1983).

A new trial will be granted on the grounds that the verdict is against the weight of the evidence only where the verdict is so contrary to the evidence as to shock one's sense of justice. *Commonwealth vs. Jensch*, 322 Pa. Super. 304, 313, 469 A.2d 632, 637 (1983).

Whether to grant a new trial for this reason is committed to the sound discretion of the trial court. *Com-*

monwealth vs. Pronkoskie, 498 Pa. 245, 251, 445 A.2d 1203, 1206 (1982); *Commonwealth vs. Jensch*, *supra*, at 313, 469 A.2d at 636.

Applying this standard, the Commonwealth established that on the evening of September 9, 1983 between the hours of approximately 6:00 p.m. on that date and 2:00 or 3:00 in the morning of September 10, 1983 the defendant, Scott Wayne Blystone, was in the company of Jacqueline Guthrie, Barbara Clark and George Powell (hereinafter in this opinion Scott Wayne Blystone will be referred to as "Blystone," Jacqueline Guthrie as "Guthrie," Barbara Clark as "Clark," and George Powell as "Powell").

The group remained together during the time stated herein and at one point stopped for sandwiches at the "AM-PM Mini-Mart" situate in the City of Uniontown. After leaving the "AM-PM Mini-Mart," they drove east from Uniontown on Route 40 to Hopwood.

At approximately 12:00 midnight, as they approached the area of the "Pizza Hut" situate in Hopwood, Blystone observed a young man hitchhiking. The Commonwealth established that the hitchhiker was Dalton Charles Smithburger (hereinafter in this opinion referred to as "Smithburger").

Blystone said "I am going to pick this guy up and rob him, okay, Barbie?" (TT 5-B) Barbie said "yeh, okay, go ahead, I don't care," and Powell said "yeh, it's cool." (TT-6-B) Blystone stopped the car and asked Smithburger if he wanted a ride. Smithburger was not known by any of the parties but was described as "tall with dark hair and wearing a light blue suit and black shoes."

Blystone asked Smithburger if he had any money, to which he replied that he only had three dollars.

Blystone turned off Route 40 toward Little Brownfield. He then pulled a gun which he had been carrying all evening and pointed it to Smithburger's head. Blystone

ordered Smithburger to close his eyes, put his hands on the dashboard and look ahead. Smithburger complied. Smithburger then opened his eyes. Blystone started to yell at him. He said "I told you once, you mother f'er, if you don't keep your f'n eyes closed I will blow your f'n brains out." (TT-7-5)

Blystone again asked Smithburger how much money he had and again Smithburger stated that he had three dollars. Blystone told Smithburger "you are only going to lose your money, not your life." (TT-8-B)

When they arrived at the Little Brownfield area, Blystone got out of the car, walked around the car, took Smithburger out of the car, and walked with him into a nearby field. Blystone returned in five minutes without Smithburger. He asked what he should do "kill the boy or what because he can identify us." (TT-9-B). Guthrie shrugged her shoulders and Powell said "do what you have to do." (TT-10-B)

Blystone left the car and shortly thereafter six shots were heard. The time was approximately 12:30 a.m. When Blystone returned, he said "it was thrilling." (TT-10-B)

Blystone then drove to the "Hi-To Gun Glub," where he stopped and told Clark, Guthrie and Powell that he would kill all of them if they told. (TT-11-B) From there they proceeded to Powell's apartment where Blystone laid money on the stand and said he had gotten "\$13.00 from the boy." (TT-12-B)

At this time Blystone described what had happened. Blystone said he made Smithburger lie face down and that before he shot him he asked him what kind of car he was in and Smithburger said all he knew was that he was in a green car and it was smashed in the back—in the rear—and then he said "bye-bye" and then shot him. (TT-12-B)

The Commonwealth further established that sometime around the 12th of December, 1983, Miles Miller (hereafter in this opinion called "Miller") contacted the Pennsylvania State Police stating that he had received information from Powell that Blystone had killed a man in Brownfield and had taken \$13.00 from him. Powell told Miller that he, Blystone, Guthrie, and Clark were present when the killing occurred.

On December 15, 1983, District Attorney Gerald R. Solomon met with Miller, Sergeant George R. Fayock of the Pennsylvania State Police, Trooper Roy Fuller of the Pennsylvania State Police, Trooper Robert V. Teagarden of the Pennsylvania State Police, and Assistant District Attorney Ralph C. Warman.

After reviewing the State Police file, Mr. Solomon and Mr. Warman met privately with Miller. Miller related the same information to the District Attorney and Assistant District Attorney that he had previously related to the State Police concerning the information he had received from Powell relating to the homicide.

Miller voluntarily agreed to have a body wire placed on his person without any promise, threat or coercion, and on December 12, 1983, executed a memorandum of consent to be wired. The District Attorney executed a memorandum of approval as required by the Act.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately fifteen years, specializing in undercover work and electronic surveillance work, had an A-Certification for electronic surveillance and wiretapping which authorized him to monitor the conversations where one party had consented to have the conversations intercepted and recorded.

An electronic recording device was placed on Miller by Trooper Teagarden, which received and electronically recorded the conversations.

In addition, there was a transmitter placed on Miller which transmitted conversation with Blystone to a recording device in a van of the police officer that would receive and record the conversation.

Miller met with Blystone and their conversation concerning the homicide was recorded.

The conversation of Blystone and Miller is as follows:

"BLYSTONE: Do you remember the body they found along the road next to the "Redhead"—along Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger—found him laying in a field shot six times.

MILLER: I don't read the fucking paper.

BLYSTONE: Shot six times in the head.

MILLER: Six Times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-bitch, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what—go to the library.

MILLER: I am not going to no fucking library.

BLYSTONE: Me and Jackie—you got to keep this quiet we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of shit and that wasn't working so I said 'fuck it—I'm going to just drive up and blow somebody's brains out and take their wallet.' George was with us. Don't burn me.

MILLER: You think I'm going to fucking go to the state cops, man, and tell them 'hey, look, and all this and that, I know this Scott Blystone.'

BLYSTONE: Don't even tell Jackie that I told you this or she'll fucking flip." (TT-100-101)

The recorded statement further revealed that Blystone stated he picked up Smithburger in Hopwood along Route 40. He knew what he was going to do and he told everybody what he was going to do. He told Smithburger that in order to go up the mountain where Smithburger wanted to go that Blystone needed gas money. Smithburger said "Well, I got a little bit." (TT-102) This "ticked" the defendant off when he said "I can only give you a few dollars," (TT-102) so he pulled out the gun and put it to Smithburger's head. Blystone told Smithburger "get your fucking hands on the dashboard." (TT-103) Smithburger started to reach in his coat. Blystone said that Smithburger didn't have a gun, but he thought he did and that he almost splattered him right there. (TT-103)

Blystone took Smithburger out of the car at gunpoint and took him into a field. He found \$13.00 on him. He took the money from Smithburger and told him to "lay down" and "you wait right here. I'll be right back. Don't move or I'll blow your fucking brains out." (TT-104) Smithburger said "I ain't going nowhere." (TT-104)

Blystone returned to the car and told Guthrie, Clark and Powell that Smithburger could identify him. Blystone said "I go to kill him. Can everybody handle it?" Everybody said "yeh, go ahead, kill him." Blystone went back to Smithburger and asked him what kind of car picked him up. Smithburger replied "all I know is it was green and the back end was wrecked." (TT-105) "I said 'goodbye,' and he tightened up and I fucking wasted him. Blood splattered all over me. I shot him six times. You should have heard it, man. Pow, pow, pow, pow, pow, pow. Brains started oozing out of this fuck. Every hole I put in his head, brains would start oozing out each time I shot him. I found brains on my nose. Jackie picked them off my face that night." (TT-105)

Blystone and the others went back to Powell's house for about two hours. While there Blystone realized that he had handled a cigarette pack with his bare hands, so they went back to the site. Blystone told Powell "I'll take you over to the body." In the event anyone was observing Blystone and Powell, they pretended to accidentally discover the body.

Blystone said to Powell, "look, man, it is a fucking body," and they walked over. George put the light on this guy. "I grabbed him by his fucking coat, pulled him up—moved him up—and, man, he was nothing but a pool of blood. One eye was out and his fucking eyebrows—his whole brow, man, was like real swollen—looked like somebody had beat him with a baseball bat—cheeks were all swollen. There was holes in them and coming out his throat and, shit, his teeth were in the ground. They were blown in the ground." (TT-page 107)

Blystone stated that nothing ever happened and it was an unsolved murder. He stated that it was easy to kill someone and get away with it. He further stated, "murder is a real fucking experience. It's wild." (TT-113) He boasted, "George never believed me. When I used to say 'I'll kill him,' he'd look at me like 'yeh, sure, okay,' but now I tell George 'hey, I'll kill you,' he looks at me like 'this motherfucker is going to kill somebody.'" (TT-114) "When I tell him that I'll kill him, it don't mean I'm going to 'beat you up or hurt you; it means I'm going to kill you.'" (TT-114) "And Jackie looks at me different, you know." (TT-114)

Blystone further stated "it don't make you feel bad, Miles. It don't make you feel like an ogre," and in response to a question from Miller, "you don't dream about it or nothing, huh?", Blystone replied "no, we laugh about it. Miles, it gives you a realization that you can do it, man. You can walk up and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know." (TT-114)

Miller identified the voice on the tape as that of Blystone, and also testified as to what Blystone had told him as to the murder of Smithburger. Miller's testimony in court was totally consistent with that which was presented on the tape (although not in as much detail).

The testimony of Guthrie and Clark was corroborated by the testimony of Arthur Richard Evans, a bartender at the "Hopwood Tavern" in Hopwood, Pennsylvania, that Dalton Charles Smithburger, who was known to Mr. Evans, left the tavern on the evening of September 9, 1983 at approximately 11:30. At that time Smithburger took with him a quart of beer in a paperbag. (TT-5)

Gina Marie Mathieson testified that she saw the victim in the "Pizza Hut Restaurant" in Hopwood around midnight. She described Smithburger and stated that he left the "Pizza Hut carrying a Pepsi-Cola in a papercup, and that she saw him walk in the direction of Route 40. (TT-7)

Judith Menner, who lives near Brownfield close to the point where Smithburger's body was found, testified that she heard gunshots at approximately 12:30 a.m. on the morning of September 10, 1983. (TT-9)

Dr. Manuel Pelaez, the pathologist, performed an autopsy on Smithburger which revealed six gunshot wounds in the back of the head of Smithburger which, according to the pathologist, was the cause of his death. (TT-20)

Smithburger was killed with a .22 caliber handgun. Blystone was carrying a .22 caliber handgun on the night of the killing.

Blystone elected to remain silent and did not testify nor offer any evidence during the trial of the case, and he elected to remain silent and did not offer any testimony during the sentencing phase of the trial.

During the sentencing phase of the trial he refused to permit trial counsel to call any witnesses on his behalf despite the efforts of his trial counsel and the court to encourage him to do so.

The court will discuss each of the verdicts of guilty in turn.

2. WAS THE VERDICT OF MURDER IN THE FIRST DEGREE AGAINST THE WEIGHT OF THE EVIDENCE?

Under the Pennsylvania Crimes Code, 18 P.S.C.A., Section 2502(a), the definition of murder in the first degree is as follows:

"Criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

An intentional killing is defined under (d) of the section as follows: Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing."

Clearly the evidence presented by the Commonwealth would enable the jury to find beyond any reasonable doubt that Blystone killed Smithburger by shooting him six times in the back of the head during the commission of the crime of robbery, and that he did so willfully, deliberately, and with premeditation and with malice.

Blystone's purpose in picking up Smithburger was to rob him. He announced his intention to do so and did in fact rob him.

Thereafter, because Blystone was fearful that Smithburger might identify him and other occupants of the car, he announced his intention to kill Smithburger and did so by firing six shots into the back of his head.

The Commonwealth's case was established by eye witnesses who were present and who testified as to events

leading up to the robbery, and upon recorded statements of Blystone as to his role in the murder, as previously set forth in this opinion.

There is no question in this court's mind that the Commonwealth produced evidence beyond a reasonable doubt which would justify the finding of the jury that he was guilty of murder in the first degree.

3. WAS THE VERDICT OF ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?

Blystone maintains that the jury's verdict on the robbery charge was against the weight of the evidence for the following reasons: Insufficient evidence was presented with regard to the taking of any of Smithburger's property; no corpus delicti of the crime of robbery was made out; and it was improper to introduce Blystone's admissions or conversations that he did in fact rob the victim since no corpus delicti of the crime of robbery had been proven.

Under the Crimes Code, robbery is defined as follows:

"(1) A person is guilty of robbery if, in the course of committing a theft he

- (i) inflicts serious bodily injury upon another;
- (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

(v) physically takes or removes property from the person of another by force however slight.

- (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission."

18 Pa. Cons. Stat. Ann., Section 3701

We would first note that, contrary to Blystone's contention, it is not necessary, in order to convict of the crime of robbery, that the Commonwealth must prove beyond a reasonable doubt that anything was in fact taken from the victim. The statute provides:

"An act shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft." 18 Pa. Cons. Stat. Ann., Section 2701

It is well settled that before the Commonwealth may introduce a confession or admission of guilt made by the accused, it must be first established by independent evidence that a crime has been committed. *Commonwealth vs. Fried*, 327 Pa. Super. 234, 239, 475 A.2d 773, 775 (1984) (citing numerous cases supporting this proposition). However, while the corpus delicti rule requires that the Commonwealth establish through independent evidence that a crime has occurred before the admission of the accused may be admitted into evidence, it does not require that the corpus delicti of the crime be proven beyond a reasonable doubt. *Commonwealth vs. Byrd*, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980). The preliminary burden of proof by the Commonwealth is slight, and it is for the trial judge to decide when the Commonwealth has sustained its burden establishing the corpus delicti. Once the trial judge has done so, the Commonwealth may admit the statements and admissions of the defendant to meet the ultimate burden of proof

beyond a reasonable doubt that the defendant has committed the crime, in this case the crime of robbery.

Blystone was charged with homicide as well as the crime of robbery. The Commonwealth established the corpus delicti of homicide when testimony was introduced to show that Smithburger was found dead in an isolated area where he had been taken by Blystone at gunpoint, having been shot in the head six times. Once these facts had been established by the Commonwealth, the admission of Blystone that he had committed the murder are admissible to prove the crime of murder, and his statement that he murdered Smithburger during the course of the robbery so that the victim could not identify him is also admissible to show motive, intent, malice, and that the murder was committed in the course of committing a felony.

Blystone is not challenging the admissibility of his statements on the charge of homicide,¹ but maintains that although the statements are admissible to prove homicide, his statement that he committed a robbery is not admissible unless independent of the homicide the Commonwealth is able to establish a corpus delicti of robbery. This is an interesting argument but this Court rejects it.

Once the Commonwealth makes out a corpus delicti of the homicide, the statement of a defendant that he killed the victim in the course of a robbery is admissible not only to show that he did kill the victim but also that he did so while in the course of a robbery.

It is not necessary to prove independent of the confession that the death occurred during a felony. *Com-*

¹ Blystone is however challenging the use of the statement that Blystone robbed the victim to establish an aggravating circumstance justifying the imposition of the death penalty as will be discussed later on in this opinion. Blystone also seeks to suppress his taped statements.

monwealth vs. Weeden, 457 Pa. 436, 444, 322 A.2d 343, 348 (1974); *Commonwealth vs. Leamer*, 449 Pa. 76, 83-84, 295 A.2d 272, 275 (1972). *Com. vs. Coley*, — Pa. Super. —, —, 504 A.2d 1286, 1290 (1987).

Further, the crimes of murder and robbery arose from a single transaction and had in common the killing of Smithburger. Thus Blystone's statement describing the single criminal incident during which both of the crimes occurred was admissible as to both once the corpus delicti of murder was established. *Commonwealth vs. Steward*, 263 Pa. Super. 191, 197, 397 A.2d 812, 814 (1979).

In any event, there was ample evidence presented by the Commonwealth to establish a corpus delicti of a robbery.

The evidence of the Commonwealth established, independent of all the statements of Blystone, that he robbed Smithburger. Blystone observed Smithburger standing along Route 40. He picked him up and inquired of him as to whether he had any money. Blystone became irritated when Smithburger told him he only had three dollars. Blystone then pulled a gun, placed it to Smithburger's head, told him to shut his eyes and place his hands on the dashboard, and told him that he was only going to lose his money, not his life. He then drove the car to an isolated area, removed the victim from the car at gunpoint, took him into an open field, and six shots were heard. Blystone returned without Smithburger and subsequently showed his companions thirteen dollars that he did not have prior to picking up Smithburger. This establishes a corpus delicti of robbery beyond a reasonable doubt, at which time the statements of Blystone are admissible on the issue of robbery. These statements established in detail that Blystone intended to find a person to rob, that he made a statement prior to picking up Smithburger that he intended to rob him, and that he killed him in the course of the robbery to prevent Smithburger from identifying him.

Applying the standard, the test of the sufficiency of the evidence, as previously set forth, this court is of the opinion that the evidence is sufficient in law to enable a jury to find each and every element of the crime of robbery beyond a reasonable doubt.

4. WAS THE VERDICT OF CONSPIRACY TO COMMIT ROBBERY AGAINST THE WEIGHT OF THE EVIDENCE?
5. WAS THE VERDICT OF CONSPIRACY TO COMMIT MURDER AGAINST THE WEIGHT OF THE EVIDENCE?

"(a) A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. . . .

"(e) No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired." . . . 18 P.C.S.A. Section 903.

As to the charge of conspiracy to commit robbery, the Commonwealth established that Blystone, as he was driving on Route 40 toward Hopwood with Powell, Guthrie, and Clark, saw Smithburger, the victim, hitchhiking along the road. Blystone said to Clark "I am going to pick this guy up and rob him, okay, Barbie?" Barbie replied, "yeh, okay, go ahead, I don't care" and George said "yeh, it's cool." (TT-5B) (TT-6B)

Blystone then picked up Smithburger, drove off Route 40 onto an isolated road and then placed a gun to the head of the hitchhiker, Smithburger. When they arrived at the Little Brownfield area, Blystone pulled off the road. Blystone told Powell to watch Smithburger so that he would not get out while he went around the car. Blystone then left the car, went to the other side and, during the interval, Powell pointed his hand to the back of Smithburger's head. Blystone, when he got to the other side of the car, removed Smithburger from the car and took Smithburger into the field.

An overt act was committed in pursuance of the conspiracy when Blystone removed Smithburger from the car at gunpoint, took the sum of \$13.00 from him, and subsequently killed him so that he could not identify them.

There was sufficient evidence from which a jury could find beyond a reasonable doubt that Blystone entered into a conspiracy with the other occupants of the car to rob the victim, Smithburger.

As to the charge of conspiracy to commit murder, after Blystone had left the car with the victim at gunpoint, had taken him into the field, and had robbed him, he returned to the car and asked Powell, Guthrie, and Clark as to what he should do "kill the boy or what because he can identify us." After Blystone made that inquiry, Guthrie shrugged her shoulders and Powell said "do what you have to do." Blystone went back into the field and shot Smithburger six times in the back of the head.

The overt act in pursuance of that conspiracy was the killing of Smithburger by Blystone. The Commonwealth has presented evidence from which a jury could find beyond any reasonable doubt that there was a conspiracy between Blystone and the other occupants of the car to murder Smithburger so that he could not identify them.

For the reasons stated herein, the court denies the motion for new trial and motion in arrest of judgment on the charge of conspiracy to commit robbery and conspiracy to commit murder.

6. WAS IT ERROR FOR THE COURT NOT TO CHARGE THE JURY THAT THEY MUST FIRST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?
7. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OBJECT TO THE CHARGE WHEN THE TRIAL JUDGE DID NOT CHARGE THE JURY THAT THEY MUST INDEPENDENTLY DETERMINE WHETHER THE COMMONWEALTH HAD ESTABLISHED A CORPUS DELECTI OF ROBBERY BEFORE THEY COULD CONSIDER THE CONFESSION OR ADMISSION OF GUILT BY THE DEFENDANT?

Trial counsel did not request the court to charge that, in order for the jury to consider the admissions and the confessions that he robbed the victim, the Commonwealth must first establish by evidence other than the admissions or confessions of the defendant that a crime was committed. Therefore, this issue is waived on direct appeal.

Blystone also contends that he was denied his right to effective assistance of counsel in that trial counsel did not request the court to charge on the issue of corpus delecti.

The court would first comment that the standard for evaluating counsel's ineffectiveness has been articulated

many times by our Appellate Court. The test is whether the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis. *Commonwealth ex rel Washington vs. Maroney*, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); *Commonwealth vs. Mott*, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

However, it is only when the course or strategy foregone by counsel was of arguable merit or could have supported the claimed defense that the court must inquire as to counsel's position for not pursuing it.

Additionally, there is a presumption that trial counsel was effective, and the burden of establishing counsel's ineffectiveness rests upon the defendant. *Commonwealth vs. Miller*, 494 Pa. 229, 233, 431 A.2d 233, 235 (1981).

The court will apply this standard in evaluating Blystone's various contentions of ineffectiveness of counsel.

Blystone contends, and properly so, that when the facts of the case present a corpus delecti issue, this issue should be framed in crystal clear terms in the jury instructions. See *Commonwealth vs. Fried*, 327 Pa. Super. 234, 475 A.2d 773 (1984); *Commonwealth vs. Frazier*, 411 Pa. 195, 191 A.2d 369 (1963). However, in this court's judgment there was no issue of corpus delecti and it was not ineffectiveness of counsel in failing to request the court to charge on the corpus delecti issue.

The court, for reasons previously set forth in this opinion, determined that the Commonwealth did clearly establish a corpus delecti of robbery, independently of any admission or statements of Blystone, as well as the corpus delecti of homicide.

In order for counsel's failure to request a charge to constitute ineffectiveness so as to warrant a new trial, it is necessary to establish that the requesting of the charge would have affected the outcome of the case. Clearly, it would not have; therefore, there is no merit in seeking a new trial on this issue.

8. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS THE TAPE RECORDING OF THE CONVERSATION OF MILES MILLER AND THE DEFENDANT?

Blystone maintains, *inter alia*:

(a) That the trial judge erred in denying the defendant's motion to suppress communications and evidence since the Commonwealth failed to establish probable cause to permit the wiretapping of defendant's conversation.

(b) That the District Attorney should not have permitted the wiretapping of defendant's conversations since it was not demonstrated that the informant was reliable.

(c) That the Title on Wiretapping is unconstitutional and violates the defendant's right of privacy assured by the Fourth and Fifth Amendments to the United States Constitution.

(d) That the District Attorney's Office should not be permitted to issue warrants for wiretapping this particular defendant's conversation since the said office cannot be an independent source to judge the evidence when it has a strong interest in the outcome of the cases.

(e) That the defendant's Fourth and Fifth Amendment rights were violated since the District Attorney's Office did not have probable cause to issue the warrant.

(f) That the informant's counsel was not given voluntarily and thus defendant's motion to suppress the communication and evidence should have been granted.

(g) That the Commonwealth failed to establish that the voice on the tape was Blystone's.

The issue is whether the District Attorney met the requirements of the Pennsylvania Wiretapping and Surveillance Act, 18 Pa. C.S.A., Section 5704(2)(ii) and whether the Act is unconstitutional in violation of the Fourth and Fifth Amendments to the United States Constitution, and in violation of Article 1, Section 8, of the Pennsylvania Constitution, as an unlawful invasion of privacy.

18 Pa. C.S.A. Section 5704(2)(ii) provides in pertinent part:

"It shall not be unlawful under this chapter for (2) any investigative or law enforcement officer, or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where (ii) one of the parties to the communication has given prior consent to such interception; however, no interception under this paragraph shall be made unless the attorney general or the District Attorney, . . . of the County wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary, and has given prior approval for the interception; however, such interception shall be subject to the recording and record-keeping requirements of Section 5714(a) (relating to recording or intercepting communications) and that the attorney general . . . or district attorney . . . authorizing the interception shall be the custodian of recorded evidence obtained therefrom."

During the suppression hearing held before trial, the Commonwealth established that the State Police had been conducting an on-going investigation since September of 1983 when Smithburger's body had been found. In December of 1983 Miller provided the Pennsylvania State Police and later the District Attorney of Fayette County with important information concerning the Smithburger homicide. Miller stated that he had spoken to Powell approximately one month or so prior to going to the State Police with his information. He related what Powell had told him about the murder, specifically how Powell, Clark and Guthrie were present with Blystone on the night that Smithburger was murdered.

Miller also revealed the particulars of the crime as related to him by Powell. Miller described where Smithburger had been picked up by Blystone and the others on the night of the murder, where they drove Smithburger on that night, the fact that it was Blystone who had done the actual shooting, and the amount of money that Blystone had taken from Smithburger. Under the totality of the circumstances, this court is satisfied that there had been a sufficient determination of probable cause to justify the authorization for intercepting and recording Blystone's conversation with Miller.

The District Attorney fully complied with the statute, determining that Miller's consent was voluntarily given and was not the result of either threats or promises. Thereafter, Miller executed a memorandum of consent witnessed by First Administrative Assistant District Attorney Ralph Warman. The District Attorney then executed the memorandum of approval authorizing the interception and recording of Miller's conversation with Blystone. The District Attorney also served as custodian of the recorded evidence in accordance with the statute.

Trooper Robert V. Teagarden, a member of the Pennsylvania State Police for approximately 15 years spe-

cializing in undercover work and electronic surveillance work, had an "A Certification" in electronic surveillance and wiretapping, which authorizes him to monitor conversations where one party to the conversation has consented to have the conversation intercepted and recorded. An electronic recording device was placed on Miller by Trooper Teagarden which received and electronically recorded the conversation. In addition, a Cal transmitter was placed on Miller which transmitted conversations with Blystone to a recording device in a van that also recorded the conversations.

As to the question of staleness, a determination as to staleness of information as it relates to probable cause must be made on a case-by-case basis. *Commonwealth vs. Samuels*, 326 Pa. Super. 561, 565, 474 A.2d 632, 634 (1984); *Commonwealth vs. Ryan*, 300 Pa. Super. 156, 170, 446 A.2d 277, 284 (1982). In the instant case, the information provided by Miller is not the type which would become stale and unable to sustain a finding of probable cause with the passage of time.

Blystone contends that a person in the District Attorney's position cannot be a neutral and detached issuing authority; however, the situation in the instant case was governed by the statute, 18 Pa. C.S.A. Section 5704, which states that the District Attorney is a proper issuing authority under the circumstances, and the court finds as a fact that the Act was fully complied with.

The contention that the Act is unconstitutional must also fail.

Article I, Section 8, of the Pennsylvania Constitution reads:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue

without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

All issues raised by Blystone challenging the constitutionality of the Act are addressed in the case of *Commonwealth vs. Victor Hassine*, — Pa. Super. —, 490 A.2d 438 (1985). See also *Commonwealth vs. Doty*, — Pa. Super. —, 498 A.2d 870 (1985). The court set forth in *Hassine* that it is abundantly clear that the type of wiretapping executed here, similar to the one conversant consensual tap allowed under Federal Law, is legal under the U. S. Constitution—citing *U. S. vs. Caceres*, 440 U.S. 741, 744, 99 S. Ct. 1464, 1467, 59 L.Ed. 2d 733, 738 (1979).

The court then determined that the General Assembly has given legal responsibility to the law enforcement officers to properly conduct wiretapping where one person consents. 18 Pa. C.S. Section 5704(2)(ii) and 5714(a).

The function of determining whether or not to permit this type of wiretapping was delegated by the Constitution to the General Assembly. *Commonwealth vs. Baldwin*, 282 Pa. Super. 82, 95, 422, A.2d 838, 845 (1980); *Commonwealth vs. Bennett*, 245 Pa. Super. 457, 461, 369 A.2d 493, 494 (1976). The court further stated "in such a situation we shall not disturb the Legislature's exercise of discretion especially where the statute does not clearly, palpably and plainly violate the Pennsylvania Constitution.

The Commonwealth identified the voice on that tape as that of Blystone by the testimony of Miller, a friend of Blystone, who engaged Blystone in the conversation that was recorded.

Therefore, since the Act authorizing the recording of the conversations is constitutional, and the Commonwealth fully complied with all of the terms and provi-

sions of the Act, and the Commonwealth established that the recorded voice was Blystone, the refusal to suppress the recorded conversations was proper.

9. DID THE TRIAL JUDGE ERR IN PERMITTING THE MEDIA TO STAND DIRECTLY BEHIND THE JURORS DURING THE PLAYING OF A TAPE?

Blystone maintains that the trial judge was in error in permitting the media to stand behind the jury box while a tape was being played.

Blystone did not object to the position of the reporters at the time of the playing of the tape, and the court does not know in fact where the reporters stood during the time the tape was played. The court was not aware that the reporters were standing behind the jury box during the playing of the tape, but there was no evidence of any impropriety and nothing offered in any way to show prejudice to Blystone. Blystone having failed to object when the incident, as alleged, was taking place, he has waived his right to do so now.

10. THE TRIAL JUDGE ERRED IN ALLOWING THE VICTIM'S FATHER TO TESTIFY CONCERNING THE VICTIM'S CHARACTER, INTELLIGENCE, AND PROPENSITY TO FOLLOW ORDERS.

Prior to the calling of Dalton C. Smithburger, Sr. as a Commonwealth witness, the trial counsel asked for an offer of proof. In response to this request the District Attorney stated, "I intend to offer him to testify as to when he last saw his son and what he was wearing and where he made the identification of the body and also what type of student his son was." (TT-24) In response to this offer of proof, trial counsel stated that he would stipulate to the identification testimony and he objected to the other parts of the offer. The trial court overruled

Blystone's objection. (TT-25) The following testimony was elicited by the District Attorney:

"Q Mr. Smithburger, what kind of student was your son?

A Well, he went to Tech School and he passed his wedding class.

Q How would you describe your son—was he a troublemaker?

A No, never a troublemaker.

Q How was he as far as listening?

A He listened pretty good.

Q If someone were to tell him something, would he do it?

A Yes, he would.

Q I believe you told the police he was in special education?

A Yes."

(TT-26-27)

Blystone maintains that this testimony as to the victim's character, intelligence, and propensity to follow orders was improperly admitted.

Blystone argues that the fact the victim was in "special education" could have created an impression in the minds of the jurors that he was a particularly vulnerable victim to criminal activity, and that this testimony had the natural and inevitable effect of creating sympathy for the deceased victim while clouding the issue of Blystone's culpability for his death.

The court feels that this argument is entirely without merit. The testimony, in this court's judgment, is relevant in that it did tend to establish the passive nature

of the victim and to lend credibility to the testimony of the Commonwealth witness that the victim, Smithburger, remained in the field for a period of time without fleeing while Blystone returned to the car to discuss the necessity of killing him.

The testimony of the father was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury.

11. DID THE TRIAL JUDGE ERR IN NOT SEQUESTERING THOSE JURORS SELECTED DURING VOIR DIRE AND TRIAL?

Blystone maintains that the trial judge erred in denying his motion to sequester the jury during voir dire and trial, alleging that he was prejudiced because the publicity surrounding the trial was of such a nature as to deny him a fair trial.

Pennsylvania Rule of Criminal Procedure 1111(a) provides:

"The trial judge may, in his discretion, order sequestration of trial jurors in the interest of justice."

Absent a showing of potential prejudice from the refusal to sequester a jury, the discretion of the trial court will not be disturbed. *Commonwealth vs. Sourbeer*, 492 Pa. 17, 19, 422 A.2d 116, 121, 122 (1980). *Commonwealth vs. Bruno*, 466 Pa. 245, 257, n.5, 352 A.2d 40, 46, n.5, (1976).

The Appellate Courts have recognized that the trial court does not abuse its discretion in refusing to sequester jurors where the trial judge continually cautioned the members of the jury to refrain from reading, or listening to, media accounts of the incident. *Commonwealth vs. Sourbeer*, supra; *Commonwealth vs. Smith*, 290 Pa. Super. 33, 42-43, 434 A.2d 115, 120 (1981);

Commonwealth vs. Gillespie, 290 Pa. Super. 336, 343, 434 A.2d 781, 785 (1981).

This court in the instant case acted promptly and regularly to insure that any publicity which might occur would have no effect on the proceedings. The jurors were cautioned at the end of each day's session to refrain from reading any newspaper accounts, listening to radio broadcasts or conversations, and to refrain from discussing the case among themselves. In addition, the court questioned the jury panel prior to the commencement of the trial and at the beginning of each day's session to determine whether any juror had in fact read any newspaper account or heard any radio broadcast that referred to the case or otherwise related to Blystone. These questions were always answered in the negative.

Moreover, unlike the characterization which Blystone urges, the publicity in the instant case was not unusual or prejudicial, but rather was factual and non-hysterical. The media coverage did not exceed that which might be expected to accompany any capital case. Under the circumstances the court is satisfied that there was no abuse of its discretion, nor was there any resulting prejudice to Blystone by virtue of the court's refusal to sequester the members of the jury during the trial.

Blystone next argues that he was denied a fair trial because of inherently prejudicial publicity surrounding both his own trial and that of a co-defendant, George Powell. More specifically, Blystone contends that the jurors selected to hear his case had too much exposure to pretrial information to permit a fair trial.

The United States Supreme Court and the Pennsylvania Appellate Courts have long recognized that one who claims he was denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the empanelling of the jury. *Murphy vs. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L.Ed 2d 589, 595

(1975); *Commonwealth vs. Bachert*, 499 Pa. 398, 408, 453 A.2d 931, 936 (1982) *cert. denied*, 460 U.S. 1043, 103 S. Ct. 1440, 75 L. Ed. 2d 797 (1983); *Commonwealth vs. Casper*, 481 Pa. 143, 150, 392 A.2d 287, 291 (1978). However, this rule is subject to an important exception:

"In certain cases there 'can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice,' *Commonwealth vs. Frazier*, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977), because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had."

Commonwealth vs. Casper, 481 Pa. at 151, 392 A.2d at 291.

A presumption of prejudice to this exception requires the presence of exceptional circumstances. *Commonwealth vs. Bachert*, 499 Pa. at 412, 453 A.2d at 938. Neither the mere existence of pretrial publicity nor a possibility that prospective jurors will have formed an opinion based on news accounts will suffice to establish a presumption of prejudice. *Commonwealth vs. Casper*, *supra*; *Commonwealth vs. Keeler*, 302 Pa. Super. 324, 329, 448 A.2d 1064, 1066 (1982).

In cases similar to the instant case, the Pennsylvania Supreme Court often refers to a frequently quoted passage in *Irvin vs. Dowd*, 366 U. S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L.Ed. 2d 751, 756 (1961):

"It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to

the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

See *Commonwealth vs. Bachert*, 499 Pa. at 410-11, 453 A.2d at 937; *Commonwealth vs. Casper*, 481 Pa. at 152, 392 A.2d at 292.

The inquiry of primary importance thus becomes whether any juror formed a fixed opinion of Blystone's guilt or innocence as a result of the pretrial publicity. The trial judge in this case participated in the examination of the jurors, and to his satisfaction all who were selected pledged to give fair and impartial consideration to the evidence. None of the jurors expressed an inability to set aside any impression which may have been gained from media coverage.

In selecting the twelve jurors and two alternates, ninety-six potential jurors were individually examined during pretrial voir dire. All jurors who indicated that they had read or heard anything about the case which had caused them to form a fixed opinion as to Blystone's guilt, were excused for cause.

The court is unable to discern, nor has Blystone set forth, any actual prejudice in the seated jurors. The court is also unpersuaded by Blystone's assertion that the pretrial publicity was so inherently prejudicial that a climate was created in which Blystone would be denied a fair trial.

A number of the local newspaper stories attached as exhibits to Blystone's brief did not appear prior to the

trial, but rather during the course of the trial. Media coverage during the trial and its effect on the jurors has previously been addressed. Other articles from local newspapers appeared far enough in advance of the trial so that any potential prejudice was erased by the passage of time between publication of the stories and the commencement of trial. In any event, all of the articles were highly objective accounts of preliminary proceedings and events in this case. None of the articles can be said to have been so sensational, inflammatory, or inculpatory that a presumption of prejudice was created.

For the reasons set forth, the court rejects the contention of Blystone that he was denied a fair trial as a result of the trial court's refusal to sequester the jury.

12. THE TRIAL JUDGE ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE INTO EVIDENCE A .22 CALIBER HANDGUN SINCE IT FAILED TO ESTABLISH CHAIN OF CUSTODY.

As to this allegation of error, the standard for the admissibility is set forth in *Commonwealth vs. Mayfield*, 262 Pa. Super. 96, 107, 396 A.2d 662, 667, 668 (1979). The court in that case stated, citing *Commonwealth vs. Jenkins*, 231 Pa. Super. 266, 271, 332 A.2d 490, 492 (1974):

"The admission of demonstrative evidence is a matter committed to the discretion of the trial court (citation omitted). The Commonwealth need not discount every hypothetical possibility of tampering with the evidence, but need only trace the chain of custody insofar as possible." (citation omitted)

The court further stated, citing *Commonwealth vs. Miller*, 234 Pa. Super. 146, 155, 339 A.2d 573, 578 (1975):

"There is no requirement that the Commonwealth establish the sancity of its exhibits beyond all moral certainty. It is sufficient that the evidence, direct and circumstantial, establish a reasonable inference that the identity and condition of the exhibits remain unimpaired until they were surrendered to the court." *Id.* at 155, 339 A.2d at 578

In the instant case the court finds that the Commonwealth did establish a proper chain of custody in order for the weapon to be admitted into evidence.

Jacqueline Guthrie testified that during July of 1983 she and Blystone went to the Genovese Coal Company yard at approximately 2:00 or 3:00 in the morning. Blystone had previously worked at Genovese Coal Company and he was going there because they owed him money and he wanted to try to get his money. He came back and showed her a black .22 caliber gun in a leather holster. She testified that it was the same weapon he had with him on the night of the killing on September 9th, 1983. She testified she was familiar with the weapon, that she had carried it, and that she had fired it a couple of times prior to the evening in question. She examined the weapon presented in court, which was a .22 caliber H & R handgun, and testified that this was the weapon she first saw that night at the Genovese coal yard. She further stated that in October of 1983 she was with Blystone at the Colonial Bar in Fairchance and that Blystone gave the gun to Neil Christopher and Neil left the bar with it. (TT-14-B-15-B)

Eugene Tedrow testified that he was an employee of Genovese Coal Company and that he was so employed by them in July of 1983, that he had at the Genovese coal yard a .22 caliber pistol, serial number AN 23544, and he had seen the gun in the garage on a vanity table. He testified he was the night watchman, that the gun turned up missing in July of 1983, and he described the gun as a .22 caliber H & R pistol.

Neil Christopher testified he received an H & R .22 caliber handgun from Blystone when he met with him at the Colonial Bar, that Blystone requested he sell it to him, and that he did sell it to a Richard Grimm of Fairchance, Pennsylvania. He described the gun as a black handled H & R .22 caliber pistol.

Richard Grimm testified he purchased an H & R .22 caliber pistol, containing a serial number, from Neil Christopher. Grimm attempted to repair the handgun, but in effect destroyed it. Grimm stated he subsequently turned the handgun, which he purchased from Neil Christopher, over to an Officer Killinger of the Pennsylvania State Police (TT-43-45).

Corporal James L. Killinger of the Pennsylvania State Police testified that he received a .22 caliber H & R pistol, with the serial number AN 23544, from Richard Grimm. Corporal Killinger stated that the weapon was completely torn down, the barrel was missing, and the firing pin had been filed off. He further testified he took the weapon to the State Police Barracks in Uniontown, Pennsylvania.

Sergeant George R. Fayock, a Pennsylvania State Trooper, testified he is the custodial officer of all evidence that comes into the possession of the State Police at the Uniontown Barracks in Fayette County. Fayock stated that on the 19th of December, 1983, he received from Corporal James Killinger an H & R .22 caliber pistol, serial number AN 23544. The H & R .22 caliber pistol was signed out and transported to the crime lab in Greensburg by Trooper A. James Anthony. Subsequently in March of 1984 Trooper Earl Roberts transported the .22 caliber pistol from the crime lab back to the State Police Barracks where it remained in the custody of Sergeant George Fayock until it was brought to trial.

The Commonwealth traced the gun from the date it first came into the possession of Blystone through the

time it was delivered into court. It is the court's opinion that the Commonwealth has met the standard for admission of the weapon on the issue of custody.

13. THE DEFENDANT'S CASE WAS PREJUDICED WHEN THE COMMONWEALTH WITNESS, NEIL CHRISTOPHER, REFERRED TO THE .22 CALIBER HANDGUN AS THE "MURDER WEAPON."

As to the contention of Blystone that he was prejudiced by the characterization of the weapon as "the murder weapon," this contention is without merit. On direct examination by the Commonwealth, the Commonwealth witness, Neil Christopher, testified as follows:

"Q He had a gun with him?

A Yes, it was with him that evening, yes.

Q Did he show it to you?

A Yes.

Q Why did he show it to you?

A He wanted to sell the murder—or the weapon."
(TT-38)

At this point trial counsel made an objection. The court sustained as to any characterization of the weapon.

No further reference was made to the weapon as the "murder weapon" from any other witness throughout the trial.

The Court is of the opinion that this did not in any way affect the outcome of the trial and, if prejudicial, it was so minimal that it cannot form the basis of consideration for a new trial.

14. THE DEFENDANT'S CASE WAS HIGHLY PREJUDICED WHEN COMMONWEALTH WITNESS, JACQUELINE GUTHRIE, TWICE REFERRED TO DEFENDANT'S CRIMINAL RECORD.

15. THE REFERENCE BY THE COMMONWEALTH WITNESS TO THE DEFENDANT'S CRIMINAL RECORD IMPROPERLY TAINTS THE DEATH SENTENCE DETERMINATION BY THE JURY.

16. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO MAKE A MOTION IN LIMINE TO REQUIRE THE COURT AND PROSECUTION WITNESSES TO AVOID ANY MENTION OF BLYSTONE'S PRIOR CRIMINAL RECORD; BY TRIAL COUNSEL'S FAILURE TO OBJECT AND REQUEST CAUTIONARY INSTRUCTIONS WHEN THE WITNESS MENTIONED AND IMPLIED THE EXISTENCE OF BLYSTONE'S PRIOR CRIMINAL RECORD; AND BY THE FAILURE OF TRIAL COUNSEL TO MOVE FOR A MISTRIAL WHEN THE REFERENCES OF BLYSTONE'S CRIMINAL RECORD WERE ELICITED BEFORE THE JURY.

During the trial, Jacqueline Guthrie, one of the prosecution's main witnesses, responded to the direct examination of the District Attorney as follows: (TT-17-B)

"Q Did you yourself carry that weapon?

A A couple of times.

Q Why did you carry it?

A Because he was on parole and he told me to carry it.

MR. WHITEKO: I am going to object to that, your Honor. May we approach the bench?

SIDEBAR CONFERENCE:

MR. WHITEKO: We object to the testimony with regard to his parole.

JUDGE ADAMS: We will sustain. Don't make reference to his being on parole.

MR. SOLOMON: She told me before that she carried the gun because Scott told her to carry it. I did not expect that answer. She told me that Scott told her to carry it and she was afraid of him and that is what I thought she would say.

END OF SIDEBAR

JUDGE ADAMS: You may restate your question."

The relevant part of the testimony of the witness, Guthrie, during cross-examination by trial counsel, is as follows: (TT-25-B)

"Q How long have you known Scott Blystone?

A Do you mean how long have I known him?

Q Yes.

A About six years.

Q How did you meet him?

A I met him through his sister.

Q How long had you been dating him?

A Since he came out of prison in—

Q How many years?

A A year and a half or two years."

The court would note that Guthrie's reference to Blystone having been in jail was not in response to a question asked by the Commonwealth, as indicated by post-trial counsel, but rather was in response to a question asked by defense trial counsel during cross-examination of Jacqueline Guthrie.

The general rule in this Commonwealth is that the testimonial reference which indicates to the jury that the accused has been involved in prior criminal activity is

prejudicial. This is not to say that all references which may indicate prior criminal activity warrant reversal. *Commonwealth vs. Nichols*, 485 Pa. 1, 4, 400 A.2d 1281, 1282 (1979). In the case of *Com. vs. Gaerttner*, 335 Pa. Super. 203, 228, 484 A.2d 92, 106 (1984), the court stated:

"Although there is no per se rule concerning the admission of evidence pertaining to prior convictions, certain principles may be distilled from the cases. Reference to a criminal defendant having been in jail clearly and unmistakably indicates a prior criminal conviction and the remark is prejudicial. When such a remark is introduced, a mistrial need not necessarily be granted as there are other factors to satisfy the requirement that the appellant receive a fair trial. A crucial consideration is whether the remark was intentionally elicited by the Commonwealth. A corollary to this is whether the answer is responsive to the question asked. In addition, the question of whether curative instructions were given is of great impact. Chief Justice Nix, in the case of *Commonwealth vs. Williams*, 470 Pa. at 178, 368 A.2d at 252, stated that although we reiterate the admonition to trial courts and prosecutors that they should exercise every possible precaution against the introduction of improper references to prior unrelated criminal activities of the accused, we nevertheless recognize that there will be situations where, even with the greatest care, such evidence may inadvertently impregnate a trial."

In the initial response by Guthrie on direct examination that Blystone was on parole was not in response to any question by the Commonwealth intended to elicit such a response. The District Attorney stated that he did not expect that answer. The witness, Guthrie, had told the District Attorney previously that she was afraid of Blystone and that is what the District Attorney thought she

would say as to the reason she was carrying the gun. That answer did not specifically state that Blystone was in jail, but to jurors familiar with the term "parole" it would indicate prior criminal conduct.

The reference by the witness, in response to the question of trial counsel on cross-examination, would indicate Blystone had been in jail and that Guthrie had been dating Blystone since he was released from jail.

The court believes that, although this is prejudicial, it was not so prejudicial as to warrant a new trial. The error is harmless in light of the overwhelming evidence of the defendant's guilt presented by the Commonwealth. See *Commonwealth vs. Story*, 476 Pa. 391, 412, 383 A.2d 155, 166 (1978); *Commonwealth vs. Weakland*, 273 Pa. Super. 361, 369, 417 A.2d 690, 694, accord, *Schneble vs. Florida*, 405 U. S. 427, 430, 92 S. Ct. 1056, 1059, 31 L. Ed. 2d 340, 344 (1972).

There is no merit in the defendant's contention that the reference as discussed herein to prior criminal activity in any way tainted the death sentence determination of the jury.

Neither the Commonwealth nor the defense made any reference at all to any prior criminal activity on the part of the defendant during the sentencing stage of the trial. The jury found that the death occurred in the commission of the felony of robbery and found no mitigating circumstance.

The jury, in accordance with law, once having made a finding of the death occurring in the commission of the felony of robbery and no mitigating circumstances, had no alternative but to return the death penalty.

As to the issue of ineffectiveness of counsel, Blystone contends that he was denied the right to effective assistance of counsel by trial counsel's failure to make a motion in limine to require the prosecution witnesses to avoid any

mention of Blystone's prior criminal record. In retrospect, it would be more desirable to have done that. The Court would note, however, that no reference was made to any prior criminal record. The witness did make reference to the defendant having been on parole and having been in jail. This would indicate prior criminal conduct on the part of Blystone but, as previously stated, the error was so slight, in view of the overwhelming evidence presented by the Commonwealth of defendant's guilt, that its introduction would not warrant a new trial. It therefore follows that trial counsel's failure to request such an instruction does not constitute ineffectiveness of counsel so as to require the Court, in good conscience, to grant a new trial.

Post-trial counsel further contends that trial counsel was inadequate for failing at that time to seek cautionary instructions or to move for a mistrial. Although trial counsel did not request the court to make any curative instructions to the jury, this does not of itself constitute inadequacy. Where it appears that an explanation by the witness or a curative instruction by the court would dispel any improper inference from an ambiguous remark, defense counsel has the obligation to make a choice either to ask for an explanation of instruction or to disregard the comment so as not to draw attention to it.

Certainly further explanation from the witness could only be damaging to Blystone and could not, in any way, be helpful.

The potential prejudice from the remark was slight and unlikely to have any impact on the jury during the course of the trial. A cautionary instruction may have merely emphasized the remark in the minds of the jury. See *Commonwealth vs. Weakland*, supra.

The standard for evaluating counsel's ineffectiveness has been articulated many times by our Appellate Court. The test is whether the particular course chosen by coun-

sel had some reasonable basis designed to effectuate his client's interest. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel had any reasonable basis. *Commonwealth ex rel, Washington vs. Maroney*, 427 Pa. 599, 604, 235 A.2d, 349, 352 (1967); *Commonwealth vs. Mott*, 278 Pa. Super. 332, 335, 336, 420 A.2d 567, 568 (1980).

As to the issue of inadequacy for failing to move for a mistrial, trial counsel's conduct would only have been inadequate if the action would bring about a different result. In this particular case, had the motion for mistrial been sought following the statements of the witness, Guthrie, in response to the question by the Commonwealth, or the response to the question by the defense, the motion would have been denied. The court can see no rational basis to require the granting of a mistrial had such a motion been made.

17. BLYSTONE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PROPERLY INVESTIGATE THE EXISTENCE AND POSSIBLE TESTIMONY OF BLYSTONE'S ALIBI WITNESSES, AND TRIAL COUNSEL'S FAILURE TO CALL ANY ALIBI WITNESSES ON BLYSTONE'S BEHALF DESPITE TRIAL COUNSEL'S KNOWLEDGE OF THE SAME.

The court would first note that the defense did not notify the Commonwealth prior to trial of any intended "alibi defense," as required by Rule of Criminal Procedure 305-C(1)(a)(d). Disclosure by Blystone under this rule is mandatory and is as follows:

"(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial

motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(d) Failure to File Notice: If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may take such other order as the interests of justice may require.

The court in *Commonwealth vs. Fernandez*, 333 Pa. Super. Ct. 279, 289-290, 482 A.2d 567, 571-572 (1984), discussed the issue of whether it was proper for the court to exclude alibi testimony where a defendant failed to notify the Commonwealth of his intent to call alibi witnesses. There, as here, Blystone had ample opportunity to advise the Commonwealth of the alibi defense, and failed to do so.

Rule 305 addresses the delicate balance between the interest of the accused in presenting a full and complete defense and the interest of the Commonwealth in avoiding fabricated alibis, unfair surprise, and the inevitable delay of justice wrought by an "eleventh-hour defense." See *Williams vs. Florida*, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 1895-1896, 26 L. Ed. 2d 446, 450 (1970).

Blystone maintains that trial counsel was ineffective for failing to interview and call Sharon Smitley, Donald

Smitley, Kathryn LaRue, Mary Kathryn Powell, and Bonnie Gibbs.

Blystone did not notify his defense counsel of the alibi witnesses until the Commonwealth had closed its case. Prior to this time, Blystone did not give any indication to his counsel that there were persons who could establish his presence elsewhere at the time the crime was committed.

At the hearing held to determine whether trial counsel was inadequate, Blystone, in open court, waived the rule of confidentiality between attorney and client. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts recited to him by the defendant, Blystone.

Trial counsel advised Blystone he would not be a party to any action that could possibly result in perjury.

In summary, trial counsel did not attempt to call the alibi witnesses or to interview them because of the late notification, the fact that their testimony would not be relevant, and the purpose for which they were being called would be inconsistent with the statements made by Blystone to trial counsel.

The court would further note that at the close of the Commonwealth's case, in the absence of the jury, trial counsel indicated to the court that Blystone was going to rest and that Blystone had elected to remain silent.

The court conducted a colloquy with Blystone and Blystone's trial counsel concerning his right to testify or to remain silent.

In the court's judgment, Blystone understood his rights and elected not to testify, voluntarily and intelligently, and elected not to call any witnesses. He did not in any way indicate to this court that there were witnesses available he could call in his defense.

Of those persons whom Blystone alleged he could call as witnesses, only Sharon Smitley testified at the hearings held to determine ineffectiveness of counsel. Her testimony was very inconclusive, in the court's judgment, and if it had been offered at trial, it would not in any way have established an alibi for Blystone. She was unable to establish to any degree of reasonable certainty the time Blystone was in attendance at her party.

On cross-examination she stated she did not remember what day of the week this was, whether it was Tuesday, Friday or Saturday. She further testified that she could not state with certainty what time Blystone arrived or the time he left. (A-79-93)

The Commonwealth called Cheryl Tkocs, the court stenographer who took the trial of George Powell, a defendant who was also charged with the homicide of Smith-burger, and she testified from her stenographic notes that Sharon Smitley had responded to the question: "How long were George, Scott and Jackie at your party?" "I would say about an hour or so." (T-100-102)

The other persons named by Blystone as alibi witnesses did not testify at the hearing on ineffectiveness of counsel. The court cannot speculate as to what their testimony would have been had they been present at the trial. Therefore, as to those witnesses, the court must find that Blystone failed to prove their testimony would have been beneficial to his case had they been called as witnesses.

It is the court's judgment that Blystone was fabricating an alibi that was totally unsupported.

Under the circumstances of this case, the failure to establish an alibi defense, if one was available (and the court has stated it does not believe it was), was not that of counsel but that of Blystone. Blystone cannot expect to wait until the Commonwealth closes its case and then advise his counsel, for the first time, of witnesses to be interviewed and called.

The court also, as previously stated, finds as a fact that Sharon Smitley is not a credible witness, that her testimony in the face of the overwhelming testimony of guilt presented by the Commonwealth, would have been meaningless.

Therefore, the court finds that trial counsel was not ineffective for failing to interview or call alibi witnesses for Blystone.

18. THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE BY TRIAL COUNSEL'S FAILURE TO PROPERLY PREPARE THE CASE FOR TRIAL AND FAILURE TO PROPERLY INTERROGATE WITNESSES DURING THE COURSE OF THE TRIAL.

Blystone maintains that trial counsel did not adequately prepare for trial.

Blystone testified at the hearing on inadequacy of counsel that trial counsel had only seen him three or four times for a total of "maybe two hours" prior to trial.

Trial counsel, Jeffrey W. Whiteko, a reputable lawyer at this Bar, maintains a record of the occasions he had made contact with Blystone concerning preparation for trial. These records established that Whiteko met with Blystone on numerous occasions and that he spent a great deal of time, in addition to the interviews with Blystone, reviewing statements and other documentation. (T-50 through 53)

The court feels that trial counsel spent ample time in preparation of the defense and did all that could be reasonably required of him in preparing the case for trial.

As to the allegation of Blystone that trial counsel failed to properly interrogate witnesses during the course of the trial, the court finds that this is totally without merit. There is no evidence to support this allegation.

Therefore, the court finds that Blystone was not denied his right to effective assistance of trial counsel.

19. THE DEFENDANT, BLYSTONE, WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO PURSUE THE COMMONWEALTH'S OFFER OF A PLEA BARGAIN OF LIFE IMPRISONMENT.

The court finds that the allegations of Blystone that trial counsel was ineffective for failure to pursue a plea bargain offer of life imprisonment is totally without merit.

Trial counsel, as well as Alphonse P. Lepore, Jr., the Public Defender, discussed with Blystone the offer of the Commonwealth of a plea bargain of life imprisonment. It was recommended by trial counsel that he accept the plea bargain, but Blystone refused. Blystone did not want to accept the plea bargain because of his belief that the incriminating tape-recording would be suppressed, and he did not want to waive any of his rights. Further, Blystone did not want to do back-up time for his other crimes. He stated he would be an old man when he got out. The failure to accept the plea bargain was solely the determination of Blystone against the recommendation of his trial counsel.

Blystone cannot now allege ineffectiveness for trial counsel's failure to further pursue it in view of the position of Blystone.

20. WAS THE DEFENDANT'S RIGHT TO A JURY CONSISTING OF A FAIR CROSS-SECTION OF THE COMMUNITY, AS GUARANTEED BY THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, DENIED BECAUSE THE TRIAL COURT ALLOWED THE PROSECUTION TO CHALLENGE FOR CAUSE THOSE POTENTIAL JURORS WHO HAD CONSCIENTIOUS, MORAL, OR RELIGIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY?

21. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO ATTEMPT TO REHABILITATE JURORS WHO EXPRESSED RESERVATIONS CONCERNING THE IMPOSITION OF THE DEATH PENALTY?

In all, five jurors out of ninety-six subjected to voir dire in this case were excused for cause upon challenge by the Commonwealth by reason of their responses to questions concerning the imposition of the death penalty?

This court is of the opinion that it is necessary to review the questions submitted to the jurors, and their responses in their entirety on this issue in order to determine whether the excused for cause was in order.

Juror number 102—Hattie M. Royster—was asked the following questions by the Commonwealth and made the following responses:

“Q If, after hearing all of the evidence in this case, you believed the defendant to be guilty of murder in the first degree, would you return such a verdict?

A Yes.

Q If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?

A Does that mean ‘capital punishment?’ I don’t believe in that.

Q That is the death penalty. Do you have a moral or religious belief against capital punishment?

A I am a Baptist and I don’t believe in capital punishment.

Q It is against your religious beliefs to support capital punishment?

A Yes, it is.”

(TT-juror 102—page 2)

At this point the Commonwealth challenged for cause. The defense counsel objected. The court overruled the objection without any further questions and excused the juror for cause. At the time juror number 102 was excused for cause, the Commonwealth had all twenty peremptory challenges remaining¹

The standard in determining whether a juror should be excused for cause as it relates to the imposition of the death penalty is set forth in *Commonwealth vs. Datesman*, — Pa. Super. —, —, 494 A.2d, 413, 417, 418 (1985) as follows:

“Whether a juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

Datesman cites *Witherspoon vs. Illinois*, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *Wainwright vs. Witt*, 469 U. S. —, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); and *Adams vs. Texas*, 448 U. S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

This court, as to Juror Number 102—Hattie H. Royster—had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court’s instructions and her oath. It is conceded that the court’s dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve

¹ In fact, during the entire voir dire the Commonwealth only exercised ten peremptory challenges out of the twenty allocated.

the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and and was properly excluded from the jury for cause.

Juror number 120—Mary B. Slavic—was asked the following questions and made the following responses:

“Q If, during this trial, you were placed in the position to make a determination on the death penalty and you were against or could not find for the death penalty, would you be swayed by any other members of the jury?

A No; I have certain principles and ideals about the death penalty myself.

MR. WHITEKO: The defense will accept this juror, your Honor.

JUDGE ADAMS: The Commonwealth may inquire.

EXAMINATION BY MR. SOLOMON:

Q You said you have certain ideals and principles concerning the death penalty. Do you have any religious, moral, or conscientious scruples against the death penalty?

A Yes, I do.

Q Under any circumstance could you return a verdict that would impose the death sentence?

A No.

Q Under no circumstance?

A Under no circumstance.

MR. SOLOMON: Challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. This means that you would not be asked to serve on this jury. We would ask that you not dis-

cuss with any other juror the questions you were asked, your responses, or your reason for not serving on this jury. Thank you. You may step down.

(TT—juror number 120—page 5)

Juror number 16—Mario S. Capotosto—was asked the following questions and made the following responses:

“Q Do you know of any reason why you should not or could not serve on this jury?

A At the present time, I don't. I may have some reason. It depends on what this is all about.

Q What do you mean by that?

A Is this a murder case?

Q Yes.

A Is there going to be a capital punishment imposed in case it has to be?

Q That may come under consideration.

A I don't believe in that. I don't believe in taking someone else's life.

Q Then you have a conscientious, moral, or religious scruple against the death penalty?

A I have.

Q Under any circumstance could you impose the death penalty?

A I would not impose the death penalty.

Q Regardless of the circumstances?

A Regardless.

MR. SOLOMON: The Commonwealth would challenge for cause.

JUDGE ADAMS: Mr. Capotosto, we would excuse you. I appreciate your honest explanation. Please do not tell any other juror why you were

excused or tell them any questions you were asked or your responses.

MR. CAPOTOSTO: I won't.

(TT—juror 16—pages 6-7)

Juror number 153—Carol Gowatski—was asked the following questions and made the following responses:

"Q If, after hearing all of the evidence in this case and taking the law as given to you by Judge Adams, you believe the defendant to be guilty of murder in the first degree, would or could you render such a verdict?

A Yes, sir, unless it was the death penalty.

Q Do you have any conscientious, moral, or religious scruples against the death penalty?

A I really don't think I could vote for the death penalty.

Q Under any circumstances, could you vote for it?

A No, sir.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would grant the challenge. We would excuse you from further service on the jury. I wish to thank you very much for coming in on such short notice. When you leave, and you may leave now, please stop at the Clerk's Office and sign your pay voucher so that you can get paid for today's service.

(TT—juror 153—pages 8-9)

Juror number 158—Frances Page—was asked the following questions and made the following responses:

"Q If, after you have listened to all of the testimony and the Court has given you the law to apply to the evidence that you heard from the testi-

mony, you believe this defendant to be guilty of murder in the first degree beyond a reasonable doubt, would you return such a verdict?

A No, I don't think I could—my religious beliefs—I don't believe in capital punishment or anything like that.

Q You have religious scruples against the death penalty?

A It is my own individual belief.

Q Under any circumstance could you return a verdict involving the death penalty?

A I couldn't. My conscience would affect me in such a way that I could not serve.

Q Regardless of the evidence you would hear in this case?

A Regardless. It wouldn't be fair if I would serve.

MR. SOLOMON: The Commonwealth would challenge for cause, your Honor.

JUDGE ADAMS: We would excuse you. We appreciate very much your coming in on such short notice, and we appreciate your honesty. Would you please turn in your badge and then go to the Clerk's Office so that you can be compensated for today's service.

(TT—juror 158—pages 10-11)

A review of the testimony of these jurors clearly shows that their exclusion for cause was proper.

There is no merit in Blystone's contention that trial counsel was ineffective because he did not object to jurors numbers 120, 16, 153, and 158 being excused for cause, or attempting to rehabilitate them, since their exclusion for cause was fully justified on the record, and any objections by Blystone would not have altered the situation.

As to juror number 102, trial counsel did object to the court excusing that juror for cause, and preserved that issue for appeal.

22. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR A POST-TRIAL EVIDENTIARY HEARING TO PRESENT TESTIMONY CONCERNING THE PROSECUTION PRONENESS OF THE JURY THAT CONVICTED HIM?

Blystone in his petition dated July 3, 1985, through his post-trial appointed counsel, requested this court to hold a hearing in order to present testimony regarding the prosecution proneness of a death qualified jury.

The evidence sought to be presented by Blystone was not specifically directed to any of the twelve jurors who were selected to sit on this jury, but rather to studies of jurors in general to establish that the "death qualification" of the jury had produced a "prosecution prone" jury.

This concept has not been judicially accepted by any Appellate Court in this Commonwealth and for very good reason. The Pennsylvania Supreme Court in *Commonwealth vs. Szuchon*, 506 Pa. 228, 258 n. 13, 484 A.2d 1365, 1381 n. 13 (1985), in a footnote stated:

"That the data remains too tentative and fragmentary to permit an appellate court to judicially notice that 'death-qualified' juries are impermissibly prosecution-prone is demonstrated by the fact that, of the reported cases that have exhaustively analyzed the data following full evidentiary hearings, our research has discovered only one case in which a conviction has been overturned on the basis of that date. *Grigsby vs. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), on remand from Eighth Circuit, 637 F.2d 525 (8th Cir. 1980). But cf. *Keeten vs. Gar-*

rison, 742 F.2d 129 (4th Cir. 1984) reversing the decision of the Federal District Court; *Spinkellink vs. Wainwright*, 578 F.2d 582 (5th Cir. 1978); *Hovey vs. Superior Court of Alameda Co.*, 28 Cal. 3d 1, 168 Ca. Rptr. 128, 616 P.2d 1301 (1980)" *Id.* at 258, 484 A.2d at 1381, n. 13.

The Superior Court in *Commonwealth vs. Datesman*, — Pa. Super. —, —, 494 A.2d 413, 417 (1985), affirmed that more recent opinions have not altered the status of the law in Pennsylvania.

For the reasons stated herein, this court rejects Blystone's position that a new trial should be granted for the reason that the jury was "prosecution prone."

23. DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO USE A PEREMPTORY STRIKE TO ELIMINATE BEVERLY BATTAGLINI FROM THE JURY AFTER THE DEFENDANT'S CHALLENGE FOR CAUSE AS TO SAID JUROR WAS DENIED.

During voir dire, Juror Number 152, Beverly Battaglini, responded to the question concerning employment by any police or investigatory agency that her husband was a District Justice serving in Brownsville. During individual voir dire, which was rather lengthy, Mrs. Battaglini responded to questions of trial counsel as follows:

"Q If Mr. Blystone elected not to present any witnesses or testimony but relied solely on the evidence presented by the Commonwealth and cross-examination, would you feel this would be evidence of guilt?

A You mean if he didn't provide anybody to come forward to testify?

Q Yes.

A I think I would.

Q As Judge Adams stated, he has that right to remain silent.

A Yes.

Q Do you feel at this time that he should present evidence on his behalf?

A Yes, I do.

MR. WHITEKO: Challenge for cause, your Honor.

JUDGE ADAMS: Mrs. Battaglini, we would first ask you—do you understand that he has no burden to provide any evidence?

A Yes.

JUDGE ADAMS: Would you feel if he didn't, that would be evidence of his guilt?

A You would only be hearing one side and that would be the State of Pennsylvania's side.

JUDGE ADAMS: That is correct, you would have to decide strictly on what the Commonwealth presented, and that is what the law is. The Commonwealth has to prove his guilt. He has no burden to prove anything, so if he offered no evidence what would you do?

A If he offered nothing I would weigh what the Commonwealth was telling me and I would judge from what they have told me whether he was guilty or not guilty.

JUDGE ADAMS: That is all we would ask. Now, if, if the Commonwealth presented their case and the defendant offered no evidence or testimony at all, how would you feel?

A If I felt the Commonwealth presented enough of a case to find him guilty, I would feel that he was guilty.

JUDGE ADAMS: Let's suppose you found that the Commonwealth did not present enough evidence, in your judgment, to convict the man, would you feel that the fact that the defendant did not offer any evidence or testimony that he was guilty anyway?

A No, I wouldn't go along with it. I would say he was not guilty. This is a man's life we are dealing with. This is the way I feel.

JUDGE ADAMS: I don't believe the juror understood the questions. We would deny the motion for cause."

(TT—juror 152—pgs. 22-23)

After further questioning by trial counsel and after Mr. Whiteko conferred with Mr. Blystone, the defendant accepted the juror. Following interrogation by the Commonwealth, the Commonwealth accepted the juror and she was then selected to serve. No further reference was made to this juror at any time during the trial.

Blystone now maintains that it was ineffective assistance of counsel for failure to exercise a peremptory challenge with regard to this juror.

At the hearing held for the purpose of determining inadequacy of counsel, Blystone admitted that he agreed to the acceptance of the juror but did so rather grudgingly. The court finds as a fact that the juror was retained at the insistence of Blystone.

Trial counsel was of the opinion that the juror would not be a bad juror. He thought from interviewing her that she would be an honest juror, would listen to the evidence, and render a true and just verdict.

Blystone was well aware that the juror was the wife of a magistrate. This was discussed with him by trial counsel.

It was a matter of judgment as to whether the juror should be left on or stricken. Apparently Blystone, who wanted her on the jury initially, changed his mind the following day and asked that the juror at that time be challenged peremptorily. Trial counsel properly advised Blystone that he could not do so because once having been accepted, she would not be dismissed from the jury except for cause. There was no cause demonstrated at any time for which Blystone could have excluded her from the jury panel. Therefore, the action of trial counsel was not inadequate as it relates to the selection of the juror.

24. DOES THE PENNSYLVANIA DEATH PENALTY SENTENCING STATUTE VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE STATUTE DEFINES AGGRAVATING CIRCUMSTANCES IN AN OVERBOARD AND ARBITRARY FASHION?
25. DOES THE USE OF THE WORD "MUST" IN THE PENNSYLVANIA DEATH PENALTY STATUTE RENDER SAID STATUTE UNCONSTITUTIONAL UNDER BOTH THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.

In *Commonwealth vs. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), the Pennsylvania Supreme Court thoroughly addressed the very issues concerning the constitutionality of Section 9711 of the Sentencing Code raised by Blystone in the instant case.

In *Zettlemoyer*, the appellant was charged with and convicted of first degree murder, and in a separate hear-

ing received the death sentence. Following the denial of the post-conviction motions, the case was automatically appealed to the Pennsylvania Supreme Court pursuant to 42 Pa. C.S.A. Sections 9711(h)(1) and 722(4). The Supreme Court affirmed the appellant's conviction for murder of the first degree, affirmed the sentence of death, and upheld the constitutionality of Section 9711 of the Sentencing Code under both Federal and State Constitutions.

Significantly, the court in *Zettlemoyer* found that juries in Pennsylvania are not mandated to impose the death penalty in all cases of murder of the first degree, and are not left without guidelines in the determination of whether to impose death or life imprisonment. *Commonwealth vs. Zettlemoyer*, supra, at 71, 454 A.2d at 966.

Under 42 Pa. C.S.A. Section 9711(c)(1)(iv) the jury may only return a sentence of death in two distinct situations:

"The verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

9711(c)(1)(v) provides:

"The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment."

This requirement that the jury's decision of the death sentence be unanimous, together with the provision that

the defendant receive life imprisonment if a unanimous verdict cannot be reached, provides an important safeguard for a defendant convicted of murder of the first degree.

Similarly, the provision for automatic appellate review, pursuant to Section 9711(h)(1), is a very important factor in a constitutionally permissible legislative scheme for imposition of the death penalty. Such a review is a "last line of defense" to guard against arbitrary sentencing by a jury. *Commonwealth vs. Zettlemoyer*, 500 Pa. at 60, 454 A.2d at 960.

Blystone in the instant case argues that the Death Penalty Statute is arbitrary, unreliable, and limits juror discretion. More specifically he argues that the statute does not provide for sufficient consideration of mitigating circumstances. In *Zettlemoyer* the Supreme Court noted that the Pennsylvania Legislature, by enacting Section 9711 of the Sentencing Code, responded to the announcements of the court in *Commonwealth vs. Moody*, 476 Pa. 223, 382 A.2d 442 (1977) and of the United States Supreme Court in *Lockett vs. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The deficiency identified in those cases was the failure to permit the jury to consider a sufficiently broad spectrum of circumstances relating to both the character of the offender and the offense with which he is charged.

Section 9711(e) cured this deficiency by providing the jury with a wide range of seven specific mitigating circumstances which they may consider and, additionally, "(a)ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. C.S.A. Section 9711(e)(8). *Commonwealth vs. Zettlemoyer*, 500 Pa. at 57, 454 A.2d at 958-59. Jury discretion is thus neither eliminated nor unduly limited, but rather is channeled in order to en-

sure that the death penalty will be imposed in a consistent and rational, as opposed to an arbitrary and capricious, manner.

26. SHOULD THE TRIAL JUDGE HAVE PERMITTED TRIAL COUNSEL TO INTRODUCE EVIDENCE TO ESTABLISH MITIGATING CIRCUMSTANCES ALTHOUGH THE DEFENDANT WAS OPPOSED TO OFFERING ANY EVIDENCE OF MITIGATION?

Blystone maintains that the trial judge should have permitted defense counsel to introduce evidence to establish mitigating circumstances although Blystone was inalterably opposed to offering any evidence of mitigating circumstances either through his own testimony or by any other witnesses.

This trial was unusual in that Blystone not only did not offer any testimony during the innocence or guilt phase of the trial but refused to offer any testimony on his own behalf or permit defense counsel to offer any testimony of other witnesses on his behalf in the penalty stage of the proceeding.

Following the finding of guilty of murder in the first degree, and prior to the sentencing phase, trial counsel advised the court that, after lengthy discussions with Blystone, and over trial counsel's strenuous objections, Blystone stated he wished to offer no evidence. Trial counsel indicated he had interviewed Blystone's parents on several occasions and that he wished to put them on the stand and also wished to put Blystone on the stand, but after two hours of discussion with him, Blystone still remained adamant in his position that he did not want any testimony offered on his behalf during the sentencing phase of trial. At this point the court extensively advised Blystone of the procedure that would follow dur-

ing the sentencing phase of the trial and that Blystone had the burden of proving by a fair preponderance of the evidence mitigating circumstances that would prohibit the imposition of the death penalty by the jury in the event the Commonwealth would prove beyond a reasonable doubt the presence of aggravating circumstances. The court explained to Blystone that if the jury found the murder was committed in the commission of a robbery that this would be an aggravating circumstance, and if there were no mitigating circumstances the jury must impose the death penalty.

After this colloquy, Blystone consulted with his trial counsel. Trial counsel then stated that Blystone wanted to know if his failure to testify or to offer any evidence during the sentencing phase of the trial would affect his right to appeal from any finding by a jury of murder in the first degree or the penalty that would be imposed. The court explained to Blystone that it would not affect his right of appeal from the conviction or the imposition of sentence, but that he could not raise as a defense to the imposition of the sentence that no testimony was offered on his behalf, and that he would be waiving that right.

The court again stated to Blystone—"do you wish to testify yourself or to have your parents testify or to offer any other evidence in this case? You had better think very carefully before you answer that question. I would tell you that I am not insisting that you testify—don't misunderstand me—because whatever decision you make I am going to abide by, but I just want to make sure that you fully understand what you are doing because tomorrow you cannot change your mind. I would ask you to consult with your counsel one more time, and then after consulting, tell me what you want to do and we will respect your wishes." Following this Blystone consulted with his counsel and, upon inquiry by the court

—"what is your decision, Mr. Blystone?", he replied, "I have no testimony and no witnesses," to which the court stated "either through yourself or anyone else?", and Blystone's answer was "no." (TT-140-144)

The court inquired of Blystone if he was taking any narcotics or medications of any kind that might affect his reasoning and Blystone stated that he was not.

The court determined, and so stated on the record, that the court found Blystone to be an intelligent man who understood what had been explained to him and that the decision he made not to offer any testimony himself or by anyone else during the sentencing phase of the proceeding was made after careful consideration and after numerous consultations with his counsel, and that he fully understood the possible consequences of his decision not to offer any testimony.

Blystone has an absolute right to remain silent, not only during the innocence or guilt phase of the trial, but also during the sentencing phase. The court could not compel Blystone to offer any testimony in either phase of the proceedings nor could the court permit Blystone's counsel to offer testimony over the objections of Blystone.

The court cannot speculate as to what would have been the effect of testimony offered by Blystone or by other witnesses during the sentencing phase of the proceeding. Blystone, however, was given the full opportunity to present whatever evidence he wished to offer by way of mitigation. Once he exercised his constitutional right to remain silent voluntarily and with full knowledge of the consequences of his decision, he cannot now raise the objection that testimony should have been offered on his behalf over his objection.

27. THE PRESENT SITUATION DOES NOT PRESENT CIRCUMSTANCES IN WHICH THE DEATH PENALTY IS APPROPRIATE, AND ITS IMPOSITION SHOCKS ONE'S SENSE OF JUSTICE, AND SAID DEATH PENALTY SHOULD BE OVERTURNED BY THE TRIAL COURT AND A TERM OF LIFE IMPRISONMENT IMPOSED.

In the instant case the Commonwealth presented evidence to establish beyond a reasonable doubt that Blystone robbed Smithburger and then intentionally and willfully murdered him to prevent Smithburger from identifying him.

The finding by the sentencing jury that the murder occurred in the commission of the felony of robbery is an aggravating circumstance that would require the imposition of the death penalty where the jury, as here, found no mitigating circumstance.

The sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases in this Commonwealth. *Commonwealth vs. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied 105 S. Ct. 360 (1984); *Commonwealth vs. Stoyko*, 504 Pa. 455, 475 A.2d 714 (1984), cert. denied 105 S. Ct. 361 (1984); *Commonwealth vs. Morales*, — Pa. —, 4914 A.2d 367 (1985); *Commonwealth vs. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1983).

After a careful review of the facts and circumstances of this case, and with the full realization of the effect of this decision, this court feels that the circumstances required, beyond a reasonable doubt, the imposition of the death penalty.

This court can find no reason to warrant setting aside the death penalty and imposing a sentence of life imprisonment.

For the reasons herein stated, the Court denied the motion for new trial and the motion in arrest of judgment by order entered March 12, 1986.

BY THE COURT,

/s/ Fred C. Adams
J.

Attest:

/s/ Charles Baer
Clerk

April 17, 1986

J-33-88

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 37 W.D. Appeal Dkt. 1986

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS

SCOTT WAYNE BLYSTONE,
Appellant

Appeal from the Judgments of Sentence of the
Court of Common Pleas of Fayette County,
Criminal Division, at Nos. 2, 2 1/4, 2 2/4 & 2 3/4
of 1984, entered on April 17, 1986

Argued: March 9, 1987

Reargued: March 7, 1988

OPINION

MR. JUSTICE McDERMOTT Filed October 17, 1988

A jury found the appellant, Scott Wayne Blystone, guilty of murder of the first degree,¹ robbery,² criminal conspiracy to commit homicide,³ and criminal conspiracy

¹ 18 Pa.C.S. §§ 2501; 2502(a).

² 18 Pa.C.S. § 3701.

³ 18 Pa.C.S. § 903.

to commit robbery.⁴ After further deliberation that same jury set the penalty for the murder conviction at death.⁵ The appellant was also sentenced to ten to twenty years imprisonment for the robbery conviction.⁶ He directly appeals these judgments of sentence.⁷

It is the practice of this Court in cases in which the death penalty has been imposed to review the sufficiency of the evidence supporting an appellant's conviction. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26-27 n.3, 454 A.2d 937, 942 n.3 (1982), *cert. denied*, 461 U.S. 970 (1983). We do so with an eye to see whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the jury to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Kichline*, 468 Pa. 265, 361 A.2d 282 (1976). In the instant case the evidence presented to the jury, together with all reasonable inferences in favor of the Commonwealth, discloses the following.

On the night of Friday, September 9, 1983, Scott Blystone, his girlfriend and another couple were riding around Fayette County in Blystone's automobile. Blystone, who was driving, worried about the fact that his automobile was low on gasoline and he had no money with which to purchase more. At approximately midnight, Blystone observed Dalton Charles Smithburger, Jr., hitchhiking. Blystone announced to his companions: "I am going to pick this guy up and rob him, okay, . . .?" His friends endorsed the idea, or at best did nothing to oppose it, so Blystone pulled over to pick up his victim.

⁴ *Id.*

⁵ 42 Pa.C.S. § 9711.

⁶ 18 Pa.C.S. § 1103(1).

⁷ See 42 Pa.C.S. §§ 722(4); 9711(h)(1). Pa.R.A.P. 702(b).

Unfortunately, Smithburger, who was not acquainted with anyone in the car, accepted the ride.

Once underway Blystone asked Smithburger if he had any money to contribute for the purpose of purchasing gasoline. Smithburger replied that he had only a few dollars and reached into his pocket. Dissatisfied with that response, Blystone drew a revolver which he held to Smithburger's head. In no uncertain terms Blystone ordered Smithburger to shut his eyes and place his hands on the dashboard. Smithburger understandably offered no resistance. Though in the course of a taped interview he would later admit that "I almost splattered him right there in the car," Blystone assured Smithburger that he would lose only his money, not his life.

Blystone pulled the car off the road at a lonely spot and walked Smithburger at gunpoint a short distance into an adjacent field. Blystone searched Smithburger, finding thirteen dollars. He ordered Smithburger to lie face down on the ground and wait. Smithburger complied. Blystone briefly returned to his companions in the car to inform them that he was going to kill Smithburger. The best that can be said for Blystone's friends is that perhaps they were startled into ambivalence by the enormity of the statement.

In any event Blystone decided to kill Smithburger. He returned to the field where he found his victim as he had left him. Blystone knelt on Smithburger's back and asked him whether he could identify the vehicle which had picked him up. Smithburger correctly replied, "all I know is it was green and the back end was wrecked." Blystone then said, "goodbye" and emptied his revolver into the back of Smithburger's head.

Such "goodbyes" are rarely the end. Such deaths take on a life of their own and rattle through the lives of the those who know, until chance or nature loosens tongues. Appellant Blystone heard more than the voice of his pas-

sengers: he heard his own voice bragging in vivid and grisly detail of the killing of that unlucky lad. (See the Appendix attached to this opinion.)

Blystone eluded detection as Smithburger's murderer for over three months. However, his associates eventually exposed him. The testimonial evidence they contributed to the Commonwealth's case, along with physical evidence, would have been sufficient to support Blystone's convictions. Additionally, an audio tape of Blystone describing the murder to an informant was presented to the jury (See Appendix). The combined effect of all this material was to present the jury with evidence of the appellant's guilt which was more than sufficient; it was overwhelming.

Nevertheless, the appellant attacks the sufficiency of the evidence supporting his robbery conviction and, consequently, the imposition of the death penalty.* Specifically, the appellant argues, the Commonwealth did not present sufficient evidence to satisfy the *corpus delicti* requirement for the crime of robbery. To establish the *corpus delicti* of robbery, the Commonwealth must prove a theft by criminal means. *Commonwealth v. Tallon*, 478 Pa. 468, 475, 387 A.2d 77, 81 (1978). In other words, the Commonwealth bears a burden to show that the crime actually occurred.

The Commonwealth presented ample evidence, apart from the appellant's own admissions, that Scott Blystone did in fact rob Dalton Smithburger. Both of the young women in the car that night testified that the armed appellant took thirteen dollars from Smithburger. One of the women testified on this point as follows:

* The only aggravating factor the jury found to exist for purposes of setting the penalty at death was the fact that Blystone killed Smithburger during the course of a felony, i.e., robbery. 42 Pa.C.S. § 9711(d)(6). Thus, the death penalty cannot stand should the robbery conviction fall.

Q. [Prosecutor]: Did Scott say whether or not he took the money?

A. He didn't have no money on him before and that is how he got the gas is with that money.

Q. With that thirteen dollars?

A. With that thirteen dollars . . .

Thus the appellant's argument on this point is meritless.⁹

Apart from the sufficiency of the evidence supporting this robbery conviction, the appellant asserts a second theory which would render this felony harmless for the purpose of setting the penalty for his murder conviction. Blystone argues that the robbery of Smithburger was completed prior to the murder and since the killing was not committed "while in the perpetration of a felony," 42 Pa.C.S. § 9711(d)(6), he cannot be sentenced to death.¹⁰ This proposition is absurd.

The crime of robbery is clearly defined:

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

(iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

⁹ The appellant also asserts that trial counsel was ineffective for failing to argue and preserve any *corpus delicti* issue relating to the robbery conviction. Since we have addressed the substance of the *corpus delicti* issue in our review of the sufficiency of the evidence, we will not consider the ineffectiveness claim.

¹⁰ See note 8, *supra*.

(v) physically takes or removes property from the person of another by force however slight.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

18 Pa.C.S. § 3701(a).

The evidence concerning the robbery and killing was uncontroverted. The appellant searched his victim at gunpoint, taking thirteen dollars; forced him to lie down; and instructed him not to move unless he wished to die. Blystone then traversed the short distance to his automobile, remaining there only long enough to announce his murderous intent and gain the endorsement of his companions. Meanwhile, Smithburger remained motionless on the ground out of fear that Blystone would fulfill his deadly promise should he resist or attempt to flee. Indeed, Blystone described in detail how he instilled doubt in Smithburger's mind as to whether his robber was merely a few feet away or fled the scene: "He never moved. He thought I was there. I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said 'don't think I am gone, mother-f---r,'" and then I f--- tiptoed off, you know." Upon his return from the automobile Blystone killed Smithburger; only then did he flee the scene. Thus, this robbery was not complete when Blystone took Smithburger's money, nor when Blystone went to his car, but when he successfully fled the scene after murdering his victim.

Finding the evidence sufficient to support the convictions, we turn our attention to what the appellant characterizes as errors of the trial court. The appellant contends that these rulings by the court tainted his trial in such a way that he must be granted another. We address these rulings of the trial judge in chronological order.

A particularly incriminating piece of evidence in the Commonwealth's arsenal consisted of a tape recording of a conversation between the appellant and a police informant (See Appendix). On the tape Blystone is heard to recall the Smithburger robbery and homicide in lurid detail. Of course, the appellant attempted to keep this evidence from the jury by means of a pre-trial suppression motion.

After a suppression hearing the trial judge denied the appellant's motion and portions of the tape were played before the jury during trial. The court found the tape admissible because the surveillance was conducted in compliance with procedures permitted under the Wiretapping and Electronic Surveillance Control Act¹¹ in that the informant consented to wear a "wire".¹² The Act provides in pertinent part:

§ 5704. Exceptions to prohibition on interception and disclosure of communications.

It shall not be unlawful under this chapter for:

...

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

...

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney

¹¹ Act of October 4, 1978, P.L. 831, No. 164, § 2, 18 Pa.C.S. § 5701 *et seq.*

¹² In this instance the informant carried a tape recorder as well as a body transmitter which enabled the police to remotely monitor and record the conversation.

general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

18 Pa.C.S. § 5704(2)(ii).

The appellant argues that warrantless consensual monitoring, as authorized by the Act, violated his rights as guaranteed by Article 1, § 8 of the Constitution of Pennsylvania, which provides:

The people shall be secured in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

This argument has been recently accepted by the Superior Court. *Commonwealth v. Schaeffer*, 370 Pa. Super. 179, 536 A.2d 354 (1987).¹³ We, however, have not heretofore considered the matter.

¹³ It should be noted that prior to the Superior Court's opinion in *Commonwealth v. Schaeffer*, 370 Pa. Super. 179, 536 A.2d 354 (1987), no court in this Commonwealth had accepted the position espoused by appellant. See *Commonwealth v. Harvey*, 348 Pa. Super. 544, 502 A.2d 679 (1985); *Commonwealth v. Hassine*, 340 Pa. Super. 318, 490 A.2d 438 (1985). See also *United States v. Geller*, 560

A look at the history of wiretapping in this Commonwealth reveals that the General Assembly has been cognizant of intrusions into the personal liberties of our citizens. For instance, our original statute dealing with the issue of wiretaps forbade any wiretapping unless all parties consented.¹⁴ However, the current electronic surveillance statute strikes a balance between citizens' legitimate expectation of privacy and the needs of law enforcement officials to combat crime. In this regard the General Assembly has provided safeguards to protect the liberties of the citizens of the Commonwealth. For instance, the statute requires the Attorney General, deputy attorney general designated in writing by the Attorney General, district attorney, or an assistant district attorney designated in writing by the district attorney, to make a review of the facts of each case. Consent for the interception must be given by one of the parties. The Attorney General, deputy attorney general, district attorney, or assistant district attorney must be satisfied that the consent is voluntary. Only then will approval for the interception be given. In addition, the intercepted communications are subject to strict record keeping requirements.¹⁵

Appellant contends, however, that despite these safeguards the statute fails to pass constitutional muster. We disagree.

A statute commands the presumption of constitutionality when it is lawfully enacted, unless it clearly, palpably, and plainly violates the constitution. *Hayes v. Erie Ins. Exchange*, 493 Pa. 150, 425 A.2d 419 (1981); *Tosto v.*

F.Supp. 1309 (E.D.Pa. 1983), *aff'd sub nom. United States v. DeMaise*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Therefore, the trial judge's rejection of appellant's position on this issue was consistent with precedent.

¹⁴ Act of July 16, 1957, P.L. 956, No. 411 § 1, 18 P.S. § 3742. See *Commonwealth v. Papszycki*, 442 Pa. 234, 275 A.2d 28 (1971).

¹⁵ See 18 Pa.C.S. § 5714(a).

Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975). Any doubts are to be resolved in favor of sustaining the legislation. *Hayes, supra*, at 155, 425 A.2d at 421.

In the area of electronic surveillance it has already been established that one-party consensual interceptions do not violate the Fourth Amendment. *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745 (1971) *reh. denied*, 402 U.S. 990 (1971) (plurality opinion). However, since state courts are free to provide broader protections based on state constitutional grounds than those provided by the federal constitution. *Cooper v. California*, 386 U.S. 58 (1967) *reh. denied*, 386 U.S. 988 (1967); *Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983), the federal precedents are not controlling, and consideration of our state constitution is required.

It has been held that the protection provided by Article I, § 8 of the Pennsylvania Constitution extend[s] to those zones where one has a reasonable expectation of privacy, *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979) *cert. denied*, 444 U.S. 1032 (1980); and that Article I, § 8 creates an implicit right to privacy in this Commonwealth. *Commonwealth v. Platou*, 455 Pa. 258, 312 A.2d 29 (1973) *cert. denied*, 417 U.S. 976 (1974). To determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable. *Commonwealth v. Sell, supra*; *Katz v. United States*, 389 U.S. 347, 360 (1967) (Concurring Opinion, Harlan, J.); *Commonwealth v. Tann*, 500 Pa. 593, 459 A.2d 322 (1983).

The United States Supreme Court has held that a person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal that conversation to

the police. *Lopez v. United States*, 373 U.S. 427 (1963) *reh. denied*, 375 U.S. 870 (1963); *United States v. White*, *supra*; *Hoffa v. United States*, 385 U.S. 293 (1966) *reh. denied*, 386 U.S. 940 (1967). Furthermore, as noted above, the Court has held that one party interceptions do not violate the Fourth Amendment. *United States v. Caceres*, *supra*.

Basically, the Supreme Court has recognized the simple fact that a thing remains secret until it is told to other ears, after which one cannot command its keeping. What was private is now on other lips and can no longer belong to the teller. What one chooses to do with another's secrets may differ from the expectation of the teller, but it is no longer his secret. How, when, and to whom the confidant discloses the confidence is his choosing. He may whisper it, write it, or in modern times immediately broadcast it as he hears it.

As applied to this case the above cited cases are particularly significant for two reasons: one, the Pennsylvania wiretapping statute is based on its federal counterpart, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20,¹⁶ the latter of which was cited with approval by the United State Supreme Court in *Caceres*, *id.* at 742;¹⁷ and two, it is the federal body of law from which we derive our test for determining what actions fall under the rubric of a privacy right, *Katz*, *supra*, (Concurring Opinion, Harlan, J.).

Although, unless dictated by Supremacy Clause considerations, we are not bound to follow the federal interpretation of the federal act or the federal constitution in the interpretation of our state statute and/or constitu-

¹⁶ Public Law 90-351, Title III, § 802, June 19, 1968, Stats. 213.

¹⁷ See also, *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978).

tion, we are in this case, persuaded by the rationale behind those decisions. As Mr. Justice White stated in the lead opinion in *United States v. White*,

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S. at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States*, *supra*; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States*, *supra* [343 U.S. 747 (1952)]. If the conduct and revelations made of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

401 U.S. at 751.¹⁸ (These statements were cited with approval in *Caceres*, *supra*, at 742-43).

¹⁸ Mr. Justice White further stated:

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that

Therefore, since we find no constitutional defect in the statute, and since the Commonwealth in this case operated in compliance with the statute, the appellant's vivid recounting of the brutal murder of Dalton Smith-burger was properly admitted.

Appellant next argues that the trial court improperly sustained a Commonwealth challenge for cause of a prospective juror because that juror's opposition to the death penalty did not illustrate an inability to perform as a juror. The relevant *voir dire* testimony follows.

Q. [Prosecutor]: *If, after hearing all of the evidence in this case and the law as his Honor, Judge Adams, will give you, and as a member of this jury you believed that the death penalty is warranted, would you impose such a penalty?*

A. *Does that mean "capital punishment"? I don't believe in that.*

Q. *That is the death penalty. Do you have a moral or religious belief against capital punishment?*

A. *I am a Baptist and I don't believe in capital punishment.*

Q. *It is against your religious beliefs to support capital punishment?*

A. *Yes, it is.*

[Prosecutor]: Challenge for cause.

with the recording in existence it is less likely that the informant will change his mind, less chance that threat of injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

United States v. White, 401 U.S. 745, 753 (1971).

[Defense Counsel]: I would object to the challenge based on her answer.

Judge Adams: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. We would overrule the objection. Mrs. [prospective juror], we would advise you that you are not going to be asked to serve on this jury because of your feeling. I would ask you please not to discuss with any other juror the questions that were asked you or your reasons for being excused. Thank you. You may step down.

(Emphasis added).

A determination of whether to disqualify a prospective juror is made by the trial judge based on both that juror's answers as well as demeanor, and will not be reversed absent a palpable abuse of discretion. *Commonwealth v. DeHart*, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), *cert. denied*, — U.S. —, 107 S.Ct. 3241 (1987).

The trial court clearly considered these criteria in granting the Commonwealth's challenge.

This court, as to Juror Number 102, had no difficulty in reaching the decision that her attitude and manner, as well as her words, indicated she had personal and religious beliefs which would prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that the court's dismissal for cause was abrupt, and that more extensive questioning would have placed an Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet

the standards set forth and was properly excluded from the jury for cause.

Slip op. at 60-61. Though the trial court is apologetic for the state of the printed record, that concern is unnecessary. For the purpose of ruling on the Commonwealth's motion, the dispositive questions were posed and answered as indicated by our emphasis. This exchange shows this prospective juror could not carry out her duty to follow the law as the trial judge would instruct and, therefore, was properly excluded. *Commonwealth v. Sneed*, 514 Pa. 597, 526 A.2d 749 (1987); *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), cert. denied, — U.S. —, 107 S.Ct. 962 (1987). See *Lockhart v. McCree*, 476 U.S. 162 (1986).

The appellant's final assertion of error on the part of the trial court concerns the testimony of the victim's father, Dalton Charles Smithburger, Sr. Appellant argues that the trial court erroneously permitted the Commonwealth to introduce testimony of the victim's character, intelligence and propensity to follow orders. The appellant contends that the impact of this testimony was to create sympathy for the victim which was irrelevant for purposes of determining the guilt or innocence of the defendant.

Initially, we note that the appellant has waived this issue by failing to object to this specific testimony. The sidebar conference during which the appellant's trial counsel voiced his objection follows.

[Defense Counsel]: We would stipulate to the testimony of Mr. Smithburger if it is merely to the fact that he identified the body as his son.

[Prosecutor]: I intend to offer him to testify as to (1) when he last saw his son and (2) what he was wearing and (3) where he made identification of the body and also (4) what type of student his son was. [parentheticals added]

[Defense Counsel]: I would stipulate to the testimony as to (3) his identifying his son, but I don't see any relevancy to (1) the last time he saw his son and (2) what he was wearing, and I would object. [parentheticals added]

Judge Adams: Does the Commonwealth wish to call him in light of the stipulation?

[Prosecutor]: Yes.

Judge Adams: We will permit you to call him. We would overrule the objection.

It is apparent from this record that the prosecutor offered this witness to address four factual matters. The appellant's trial counsel was willing to stipulate to one of these points and objected to two others. The fourth matter, which is the issue here, was not opposed then or later and, therefore, has been waived.

However, it is of little import that the appellant did not technically preserve his objection because the substantive argument supporting it is meritless. That argument points to the following testimony as prejudicial to the appellant.

Q. [Prosecutor]: Mr. Smithburger, what kind of student was your son?

A. Well, he went to Tech School and he passed his welding class.

Q. How would you describe your son—was he a troublemaker?

A. No, never a troublemaker.

Q. How was he as far as listening?

A. He listened pretty good.

Q. If someone were to tell him something, would he do it?

A. Yes, he would.

Q. I believe you told the police that he was in special education?

A. Yes.

[Prosecutor]: I have no further questions.

Evidence which has the effect of arousing sympathy for a crime victim is prejudicial and inadmissible when otherwise irrelevant. *Commonwealth v. Story*, 476 Pa. 391, 402, 383 A.2d 155, 160 (1978). In this case it is not apparent that the above testimony had the threshold impact of evoking sympathy for the victim in the minds or hearts of the jurors. The assessment of the trial court was that the "testimony was delivered in a matter-of-fact tone and was not done in a manner which would inflame the jury." Slip op. at 36. The mere characterization of the victim as an individual having a learning disability does not make his homicide more, or less, heinous.

Furthermore, this evidence was probative of the victim's passive nature and thereby lent credence to the Commonwealth's account of events prior to his death. Specifically, evidence of the victim's passiveness served to explain, at least in part, why Smithburger remained prone in the field while Blystone was at his automobile discussing with his companions the necessity of killing him. The appellant himself in his taped statement admitted that he was surprised by Smithburger's obedience.

I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f---r ain't goint to lay there, but I wanted to warn them—you know, Jackie and George—I wanted to warn them that I was going to waste him—I went back. I went back just expecting this mother-f---r to be through the fields. I had to laugh.

The testimony of Mr. Smithburger, being more probative than prejudicial, was properly allowed by the trial court. See *Commonwealth v. Ulatoski*, 472 Pa. 53, 63 n.11, 371

A.2d 186, 191 n.11 (1977). See also *Commonwealth v. Story*, *supra*, at 402, 383 A.2d at 160.

In addition to allegations of error on the part of the trial court, the appellant asserts that his trial counsel was ineffective because he failed to investigate and present an alibi defense. Blystone, represented by a different attorney, presented this complaint to the trial court long after the jury rendered its verdicts and set the appropriate penalty for the homicide conviction. After a post-trial hearing conducted to air this grievance the trial court determined that appellant's argument was meritless. We concur.

Initially, we note the appellant did not comply with the mandatory notice provision of the rule governing the presentation of an alibi defense, which provides:

C. Disclosure by the Defendant

(1) *Mandatory.*

(a) Notice of Alibi Defense. A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

Pa. R. Crim. P. 305.C.(1)(a). The consequences to a defendant who ignores the notice provision are also made clear in the rule:

(d) Failure to File Notice. If the defendant fails to file and serve notice of alibi defense or insanity

or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

Pa. R. Crim. P. 305.C. (1) (d).

This was not, however, an instance in which the alibi defense was barred simply because of a failure to comply with the Rules of Criminal Procedure. Blystone chose to present no defense whatsoever after the conclusion of the Commonwealth's evidence. At that point in the proceedings the trial judge conducted a colloquy out of the jury's presence to ensure that the appellant understood his right to advance evidence on his behalf. The appellant gave no indication to the trial court that an alibi defense was feasible. Consequently, there was not even an opportunity for the court to abuse its discretion in the application of the alibi defense rule, Pa. R. Crim. P. 305.C. (1).

Additionally, it is apparent from the record of the post-trial hearing that Blystone's alibi was a fabrication. At that proceeding the appellant waived the attorney-client privilege of confidentiality existing between him and his trial counsel. Trial counsel then testified that the testimony of the alibi witnesses would be contrary to the facts as recited to him by Blystone. In other words, the alibi witnesses would be perjuring themselves. It was also apparent that Blystone did not tell his trial counsel of the possibility of establishing his presence elsewhere at the time of the crime until after the Commonwealth rested its case.

During the post-trial hearing the trial court, through its own diligence, went so far as to locate one of the ap-

pellant's alibi witnesses and import her from West Virginia for the purpose of testifying at the proceeding. After hearing the witness' testimony, and juxtaposing it with that which she had rendered in a separate prosecution arising from the same incident, the trial court found the witness was not credible. Slip op. at 56.

This Court will not label counsel ineffective for failing to suborn perjury. Therefore, the appellant's argument is meritless.

In addition to the claims already aired, the appellant raises three arguments challenging the constitutionality of the death penalty. One of these arguments is couched in terms of error by the trial court. The appellant asks: "Whether the trial court erred in denying the defendant's motion for an evidentiary hearing to present testimony concerning the prosecution-proneness of the jury that convicted him?" To accept the appellant's contention of error, would be to accept the worth of his substantive argument to the effect that death qualified juries are prosecution-prone. We will not do this. *Commonwealth v. DeHart*, *supra*, at 250-53, 516 A.2d at 664-665. See *Lockhart v. McCree*, *supra*.

The appellant next asserts that the death penalty statute is unconstitutional under both the United States and Pennsylvania Constitutions because of its mandatory language. The part of the statute operative in this instance states: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance," 42 Pa.C.S. § 9711(c) (1) (iv). We will not dwell on this issue beyond noting that the appellant's argument was expressly refuted in the case of *Commonwealth v. Peterkin*, *supra*, at 326-28, 513 A.2d at 387-88.

The appellant also argues that this Commonwealth's death penalty sentencing statute violates his Eighth Amendment protection against cruel and unusual punish-

ment¹⁹ because the operative aggravating circumstances in this case²⁰ is overbroad, arbitrary, and does not differentiate those murders which justify the penalty from those which do not.

The statutory procedure governing the imposition of the death penalty in this Commonwealth channels the discretion of the sentencing body to prevent the arbitrary and capricious imposition of capital punishment. *Commonwealth v. DeHart*, *supra*; *Commonwealth v. Zettlemoyer*, *supra*. Since we have previously held that the sentencing system on its face does not operate in an arbitrary or capricious manner, Blystone cannot prove a violation of his constitutional rights by mere assertions that other defendants who were similarly situated did not receive death sentences. See *McCleskey v. Kemp*, — U.S. —, —, 107 S.Ct. 1756, 1774 (1987), *reh. denied*, — U.S. —, 107 S.Ct. 3199 (1987). The focus of his challenge must, therefore, be upon the sentencing mechanism as it has been employed to render his death sentence.

A sentence of death is not merely the product of evidence which supports a particular aggravating circumstance. The Commonwealth must first prove beyond a reasonable doubt that an aggravating circumstance applies to the particular homicide. Thus, an aggravating circumstance has no relevance in the abstract; it can only be applied against an individual defendant by the

¹⁹ The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962), *reh. denied*, 371 U.S. 965 (1962).

²⁰ The pertinent portion of the sentencing statute states:

(d) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

...
(6) The defendant committed a killing while in the perpetration of a felony.

42 Pa.C.S. § 9711(d)(6).

particular sentencing body weighing the evidence before it. Should the fact-finder determine the Commonwealth has satisfied its burden of establishing the aggravating circumstance, then, and only then, does a penalty of death become cognizable. Therefore, the establishment of an aggravating circumstance represents the crossing of a threshold from a condition in which the sentencer cannot render a verdict of death to one in which it must. 42 Pa.C.S. § 9711(c)(1)(iv).

However, an individual may thwart the imposition of the death penalty by offering evidence of mitigating circumstances concerning his character, record, and the circumstances of the offense. 42 Pa.C.S. § 9711(e). In this manner the fact-finder may consider any relevant circumstance that could cause it to decline to impose the death penalty. A balancing of aggravating and mitigating factors which favors the defendant cannot be reversed, as that determination by the sentencing body is unreviewable. On the other hand, a sentence of death produces an automatic appeal to this Court in which we will curb abuses of the trial or sentencing proceeding.²¹

²¹ The Sentencing Act provides:

(h) Review of death sentence.—

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

There is no question that the death penalty may be constitutionally imposed for a murder committed in the course of a planned robbery. *McCleskey v. Kemp*, *supra*, at —, 107 S.Ct. at 1774; *Gregg v. Georgia*, 428 U.S. 153 (1976); *reh. denied*, 429 U.S. 875 (1976). In this case the jury expressly found this aggravating circumstance to exist and, thus, Blystone's case rose above the level below which the death penalty may not be imposed. Since he refused to present any evidence of mitigation, there was nothing to block that passage. Based on its finding that there existed one aggravating and no mitigating circumstance the jury returned a sentence of death. We find no fault with the sentencing body's performance of its duty.

Finally, it is the practice of this Court to examine, *sua sponte*, whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant. *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), *cert. denied*, 469 U.S. 963 (1984). In examining this claim we emphasize that the statute requires a verdict of death in those instances in which the jury finds one or more aggravating circumstances and no mitigating circumstance, 42 Pa.C.S. § 9711(c)(1)(iv). Thus, by the very terms of the statute the death penalty cannot be considered excessive to the circumstances of this defendant.

Further, we note that the continuing study of capital cases maintained by the Administrative Office of Pennsylvania Courts (AOPC) reveals that Blystone's punishment is not out of proportion to that imposed on similarly situated defendants.²²

considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. § 9711(h).

²² The AOPC study indicates that in those instances in which sentencing bodies have found one or more aggravating circum-

For the foregoing reasons, we sustain the convictions of murder of the first degree, robbery, and criminal conspiracy to commit those offenses. The sentences of death and ten to twenty years imprisonment are affirmed.²³

Mr. Justice Zappala files a Dissenting Opinion in which Mr. Justice Larsen joins.

stances to exist in the absence of any mitigating circumstances, a sentence of death was returned in the overwhelming majority of those prosecutions.

²³ The Prothonotary of the Western District is directed to transmit to the Governor a full and complete record of the proceedings of this case both in the trial court and this Court. 42 Pa.C.S. § 9711(i).

APPENDIX

THE FOLLOWING IS AS THE TAPE WAS HEARD BY THE COURT REPORTER:

BLYSTONE: Do you remember the body they found along the road next to the Redhead—along the Brownfield Road? Remember the body they found?

MILLER: Huh-uh.

BLYSTONE: Smithburger—found him laying in a field shot six times.

MILLER: I don't read the f—g paper.

BLYSTONE: Shot six times in the head.

MILLER: Six times?

BLYSTONE: Six times in the back of the head.

MILLER: Must have been a strong son-of-a-b—, huh?

BLYSTONE: They found five bullets in his head and a fragment of one and they said he had on a blue suit, a three piece suit, and lived up on the mountains, and they found him about a mile from the Redhead. Remember?

MILLER: Scott, I don't read the God damn paper.

BLYSTONE: Tell you what—go to the library.

MILLER: I am not going to no f—g library.

AT THIS POINT JUDGE ADAMS ASKS THE OFFICER TO STOP THE TAPE. HE THEN INQUIRED OF THE JURORS WHETHER OR NOT THEY COULD HEAR THE TAPE AND SOME OF THE JURORS RESPONDED THAT THEY COULD HEAR PORTIONS OF IT BUT SOME OF THE PORTIONS THEY COULD NOT UNDERSTAND.

JUDGE ADAMS: The tape gets stronger as it goes along. You may continue, officer.

OFFICER THEN CONTINUES TO PLAY THE TAPE, AND THE FOLLOWING IS THE TAPE AS HEARD BY THE COURT REPORTER:

BLYSTONE: Me and Jackie—you got to keep this quiet—we were out one night, and we didn't have any money, and I had a .22 and I kept telling them that we got to get money. We tried all kinds of s— and that wasn't working so I said "f— it—I'm going to just drive up and blow somebody's brains out and take their wallet." George was with us. Don't burn me.

MILLER: You think I'm going to f—g go to the state cops, man, and tell them "hey, look, and all this and that, I know this about Scott Blystone."

BLYSTONE: Don't even tell Jackie that I told you this or she'll f—g flip. Anyway, there's this guy hitchhiking (inaudible to reporter) and it was about 11:00, and we picked him up. Jackie is sitting in the middle, and so he got in, you know, and he said he was going up over the mountains, and I said "that's where we are headed." I said "we need gas money" and he said "well, I got a little bit." You know how everybody says they got a little bit.

MILLER: Yeh.

BLYSTONE: So I said "how much you got?" He said "not that much but I can give you something for gas" and then we pulled up to the foot of the mountain—that road that turns off from Hopwood.

MILLER: Taste this man. This is bad.

BLYSTONE: I pulled off and I said "I got to make sure, man, before I go up this mountain 'cause I ain't got gas to get back and then what the f— would I do."

MILLER: Wait a minute, you picked this guy up?

BLYSTONE: Yeh, in Hopwood on Route 40. I knew what I was going to do. I told everybody what I was going to do.

MILLER: Before you did it?

BLYSTONE: Yeh. They thought I was bull-s—g. Everbody thinks that Scott bull-s—s.

MILLER: Ain't that good apple pie?

BLYSTONE: It is pretty good.

MILLER: I told you you should have got one.

BLYSTONE: You don't believe this, do you?

MILLER: Go head.

BLYSTONE: He said something that ticked me off, you know, like "I can only give you a few dollars" or something like that, and so I pulled the gun out and stuck it around behind Jackie and I put the gun to his head and I said "get your f—g hands on the dashboard," and then I started reaching in his f—g coat. That's the part I got to leave out, that and one other part.

MILLER: Did he have a gun?

BLYSTONE: No, but I thought he did, and I almost splattered him right there in the car. That's when the car was wrecked—the back end was real f—d up, real identifiable. I told everybody what I had to do. So (inaudible to reporter) I said to him "get them on the dashboard, put them there" and then we went out the Brownfield Road and stopped for a second. I told George—I said "you get ahold of him until I get out of the car and come around to the other side." I didn't want this mother-f—r to get out and run, you know.

MILLER: George was holding him in the car, huh?

BLYSTONE: George was scared to death.

MILLER: He held him there, didn't he?

BLYSTONE: F—g right.

MILLER: He didn't?

BLYSTONE: I went around the other side of the car and put the gun to him and said "get out." I went back in the field with him. "George, come on" I said, "help me." George kept f—g around. Jackie told me that George was back there making excuses—"I got to light a cigarette" and "just a minute" and (inaudible to reporter) and "I'm getting out" and all this s—.

MILLER: He was scared.

BLYSTONE: In the meantime I had him back there searching him. If found his money (inaudible to reporter) which wasn't f—g much at all.

MILLER: How much was it?

BLYSTONE: I guess I can tell you because the cops wouldn't know—\$13.00.

MILLER: \$13.00?

BLYSTONE: Yeh, unlucky mother-f—r, it was a Friday and he had \$13.00. I said "where's the rest" and he said "that's all I got." I told him "lay down," and I said "you wait right here. I'll be right back." I said "don't move or I'll blow your f—g brains out." He said "I ain't going nowhere."

MILLER: You going to eat these fries?

BLYSTONE: No, go ahead. So then I ran back to the car. I said "he has got" (inaudible)—I didn't know how much it was. I said "he has got about \$15.00 on him."

MILLER: Ain't no wonder you don't want them, man; they are f—g cold.

BLYSTONE: I said "he can identify us—he was looking." He kept looking. I kept telling him "close your f—g eyes, you mother-f—r."

MILLER: When he was down on the ground?

BLYSTONE: No, when he was in the car. He kept looking at us, you know, and he was looking in the back

seat and I said "shut your f---g eyes, man." He'd go (some sort of sound), and I said "turn your f---g head." He would turn his head like that, and I said "man, you're dead." So then I ran back to the car and told them "I got to kill him,"—said "can everybody handle it."

MILLER: You left him there and you ran back to the car?

BLYSTONE: He never moved. He thought I was there. (inaudible) I stepped around him, right, and I walked a little bit in a circle and I stopped. I didn't make no noise, and I said "don't think I am gone, mother f---r," and then I f---g tiptoed off, you know. I told them I said "I'm going to kill him." Everybody said "yeh, go ahead, kill him,"—you know, so I f---g ran back there and got over top of him and I said "what kind of car were you in tonight?" He said "I wasn't driving, man." He said "I told you I don't have a car," and I said "what kind of car picked you up?" He said "all I know is it was green and the back end was wrecked." I said "goodbye" and he tightened up, and I f---g wasted him. Blood splattered all over me, and then I came running back to the car—jumped in the car. Jackie had it in drive. I shot him six times. You should have heard it, man—pow, pow, pow, pow, pow, pow. Brains started oozing out of this f---. Every hole I would put in his head, brains would start oozing out each time I shot him, right?

MILLER: Uh-huh.

BLYSTONE: I found brains on my nose. Jackie picked them off my face that night. I jumped in the car, and the car was f---g rolling. We went back to George's house and got the blood off me.

MILLER: I bet they was scared. They probably thought you was bull-s---g.

BLYSTONE: I know. It's like they didn't believe me. I had blood all over me.

MILLER: Was George there?

BLYSTONE: Yeh.

MILLER: He was right there?

BLYSTONE: No, he didn't get out of the car. He never got out of the car. Then I ran back, and I didn't say nothing to him until later on and I said "man, you were supposed to be with me." Then Jackie told me what he was doing—he was stalling. I left some evidence back there. When I was searching him I pulled out a pack of cigarettes and I picked up the pack with my bare hand. We sat around (inaudible).

MILLER: Pack of cigarettes?

BLYSTONE: I know for two hours we sat at the house. I sat there and I said "man, they can't get the footprints—there is a million out there." "There ain't no scrapings under his nails or nothing, or under mine," and I said "we got all the blood off." I kept telling them "get that pack of cigarettes." I said "that's the only thing that can get me." I said "f--- it—we are going back down," and then we ran out of gas—we ran out of gas out there.

MILLER: Where at?

BLYSTONE: Right after we went back.

MILLER: You ran out of gas right there?

BLYSTONE: About 200 yards from it.

MILLER: Back towards the gas station?

BLYSTONE: Uh-huh.

MILLER: You didn't have far to walk then?

BLYSTONE: Huh-uh. Anyway, we got back there, and I told George—I said "look, the place might be staked

out." I said "we are going to get out of the car like we are taking a p—," and I said "I'll take you over to the body and stand there and just keep talking—bull-s—g" and then I said "you look over and notice and say 'hey, what's that' "?

MILLER: You like that apple pie?

BLYSTONE: Uh-huh. So we get over there, right—get out of the car.

MILLER: I'd like another bite of that mother-f—r too.

BLYSTONE: (inaudible to reporter).

MILLER: You should have bought one of these. You should have let me buy you one.

BLYSTONE: We get out of the car, pull our d—s out and start p—g, and George says "what's that?"

MILLER: You didn't p— on him, did you?

BLYSTONE: Huh-uh. George said "what's that—look" and we were talking nice and loud in case there was any cops in the bushes. He said "right there" and I said "I don't know" and I said "my God, it looks like a body" and George said "no, man" and I said "look, man, it is a f—g body."

MILLER: In case there was somebody around?

BLYSTONE: (inaudible to reporter) went back there and said "if you ask me, George, I blew his head off, man."

MILLER: (inaudible).

BLYSTONE: So he said "my God, we had better call the police." I said "yeh, let's look for some I.D. and see if we can find out who he is." I started looking. I had this f—g light—looking around.

MILLER: Just in case there was some body around?

BLYSTONE: Right. I said "try to find some I.D. on him." I knew we were looking for the cigarette pack—couldn't find it nowhere. Then I remembered when he laid down—when I took the stuff off of him, I threw it down in front of him. I threw it down in front of him when he laid down—he laid straight down.

MILLER: On his face?

BLYSTONE: I said "George, it must be under his f—g body" and we walked over. George put the light on this guy. I grabbed him by his f—g coat, pulled him up—moved him up, and man, he was nothing put a pool of blood. One eye was out and his f—g eyebrows—his whole brow, man, was like real swollen—looked like somebody had beat him with a baseball bat,—cheeks were all swollen. There was holes in them and coming out of his throat, and s—, his teeth were in the ground. They were blown in the ground.

MILLER: Big time, huh?

BLYSTONE: This f—r was done—he was a f—g mess. I tell you he was drenched in f—g blood. I picked the pack up and I stuck it in. I said "man, let's call the police." We jumped back in the car, went back to the house, and waited all night.

MILLER: You took that pack of cigarettes off of him?

BLYSTONE: We smoked them. They had blood on the filters and we smoked the f—g cigarettes, and we waited right. We kept waiting and waiting to hear something on the TV or the radio.

MILLER: Were they "Kools," man?

BLYSTONE: No, I can't tell you what they were 'cause that's another thing too—they were unusual.

MILLER: I don't give a f—.

BLYSTONE: Then we went back two or three hours later, right.

MILLER: You went back three times?

BLYSTONE: Twice.

MILLER: Oh.

BLYSTONE: I killed him and then we went back for the cigarettes, and (inaudible)—So we went back to the house, right, and we are sitting around listening and waiting—just f—g waiting. I think about—

MILLER: You went back to George's house?

BLYSTONE: Uh-huh.

MILLER: After you done run out of gas?

BLYSTONE: Well, when we left there the second time when we got the f—g cigarettes, we are going up the f—g road and the car goes (sound)—oh, f—, man, I put it in neutral and drifted it as far as I could and then pushed it over to the gas station, and then this dude got us some gas downtown.

MILLER: You must have been right up on top of the hill then?

BLYSTONE: Yeh—so anyway, about 11:00 the next day—

MILLER: Because I know you and George can't push that car up that f—g hill.

BLYSTONE: Not uphill, no. It drifted a good ways. I was rolling. When I came out I was rolling. We were acting like we found a dead body. So the next day we all went to sleep for three or four hours, and got up and turned it on, and we were waiting and waiting—nothing, man—no TV, no radio, nothing. They had to find him. I said "they should have found him at the crack of dawn." Finally on WPQR "we interrupt this"—you know how they bull-s—"body of an unidentified man found" I don't even think they said "shot to death"—

they said where he was—that he was dead, and about an hour or so later then said that he was shot. Then it came out in the papers that he was shot six times in the head, and they kept talking about it on the radio.

MILLER: This next day?

BLYSTONE: Yeh. It was on TV and it was on the news—6:00 news. It was in the paper for about three days that the State Police needed help in the slaying—that a man was shot with a .22 caliber pistol six times in the back of the head along Brownfield Road, and that he was 6-3 and weighed, I think, 195.

MILLER: Is that the gun we shot off my porch?

BLYSTONE: I wasted him, Miles. That mother-f—r, when I got over him, I was down—

MILLER: You still got that f—g thing now?

BLYSTONE: That's why I told you I couldn't sell it—the murder weapon.

MILLER: I hope you got that mother-f—r put away.

BLYSTONE: I buried it. I bent down over top of him—

MILLER: Up there at your dad's house?

BLYSTONE: In the woods. I put it down to his head, and when I shot, man, the barrel was only this far from his face. Every time I fired, f—g s— would splatter in my f—g face. I got up and ran back to the car, but they didn't believe it. Everybody was real (inaudible)—real calm 'cause all they could hear was shots. We went back—Jackie saw it—couldn't have been right from here to the car, and when George lit that lighter and I picked him up, you could see his face and he looked like a f—g ghoul—like a mummy or something. His face was all f—g swollen and black and blue. His eyes were clouded over. His f—g teeth—blew all his f—g teeth

out, and about half of his jaw came off, but nothing ever happened. Nobody ever came to us. Nobody ever ask no questions—nothing—it's an unsolved murder.

MILLER: Man, oh, man.

AT THIS POINT THE TAPE WAS STOPPED.

JUDGE ADAMS: Officer, you may go into my chambers to adjust the tape.

THE OFFICER AND ATTORNEY SOLOMON GO INTO THE JUDGE'S CHAMBERS TO ADJUST THE TAPE.

AFTER DOING SO, THE OFFICER AND ATTORNEY SOLOMON RETURN TO THE COURTROOM AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: What I am trying to tell you, man, is—it's easy. It's f—g easy, you know.

MILLER: To kill somebody?

BLYSTONE: To get away with it.

MILLER: Yeh, I guess so—like that—God damn.

BLYSTONE: It was wild. You should have seen it. You should have seen George give me that f—g look. He was standing there p—g. He was standing like this and he was f—g looking, you know. (inaudible) When I turned him over I thought he was going to (inaudible) boom, boom, boom—I was ready to go again.

MILLER: You had it loaded up again, huh?

BLYSTONE: I would have man. It was—I was ready to go—I swear. Miles, this man is six feet. Jackie said—when he put his hand like this (inaudible), I said "put your hands on your head." He put them like this and his f—g hands curled clean down over his knees.

MILLER: He was a big dude?

BLYSTONE: I said "don't you move." I told him—I said "I'll splatter you all over this f—g car." He said "I ain't doing nothing." I said "don't you touch the doorknob—don't touch my girl." I said "don't take your hands off your legs or I'll waste you"—and when I told him "goodbye"—

MILLER: He didn't try f—g nothing—he never tried to get away or nothing?

BLYSTONE: No. I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-f—r ain't going to lay there, but I wanted to warn them—you know, Jackie and George—I wanted to warn them that I was going to waste him—I went back. I went back just expecting this mother-f—r to be (inaudible) through the fields. I had to laugh.

MILLER: So when you came back to the car you just f—g said "I'm going to waste the mother-f—r", and when you went back to him you said "I'm going to waste you" and he didn't—

BLYSTONE: No, I didn't tell him then.

MILLER: —f—g get up or nothing?

BLYSTONE: I didn't tell him then. I didn't tell him I was going to waste him then. I asked him what kind of car he was in and he said "all I know it is was green and it was wrecked in the back." I said "well, goodbye." He tightened up—tensed up. I think he s— himself. His whole body went rigid because I was sitting on him.

MILLER: You was sitting on him?

BLYSTONE: Sitting on his back, you know—had my knees across him, and I told him "well, goodbye," (inaudible)—the barrel. So I put it to his head and then pulled it off an inch and then I said "goodbye." He went like that, and that's the last move he made and I hit him.

MILLER: He didn't move after that?

BLYSTONE: He never moved.

MILLER: I guess not, man—f—g six pieces of lead flying in your f—g head.

BLYSTONE: Pow, pow, pow, pow, pow, pow. I jumped up, came running back. We went back to the house and Jackie said "what's that on your face" and I said "that a f—g piece of his brain." She said, "oh, my God, brains." (inaudible)—and was playing with it and threw it in the ashtray—had to wipe my face of—had to take a shower and soak my clothes in cold water. You know that number 12 football jersey I had, the white jersey with the blue shoulders?

MILLER: Yeh.

BLYSTONE: That's the one I killed him in. I think I had these pants on too—I am not sure. These are jeans. I forget what it was.

MILLER: God damn. You f—g (inaudible)—you just f—g done it. You don't want none of this milkshake, do you?

BLYSTONE: (inaudible) There ain't nothing to getting away with something, you know. It's very easy. If you'd go—

MILLER: Wait until I throw this s— in the back of the truck, man. I am going to throw it down here. That's f—g ignorant. I'll give this sandwich to Rover. Remember Rover? I hope it f—g blows out all them papers and s— you know.

BLYSTONE: If you know what you are doing, man, you can get away with anything, including murder. It ain't hard at all.

MILLER: God damn.

BLYSTONE: I knew the only way I could get caught is if somebody talked, but nobody's going to talk 'cause I'm going to kill them too.

MILLER: Yeh, no s—.

BLYSTONE: George—ever since then George has been like—

MILLER: Ain't you afraid that f—g George might tell somebody?

BLYSTONE: No, see I told George that I'd waste him too. I said "I'll torture you." I told him I'd blow his f—g c— off and everything else if he opens up his mouth. Like (inaudible). He is an accessory to murder. He went back there and touched the body with me, and Jackie's an accessory.

MILLER: How did he touch it if he was holding the f—g lighter?

BLYSTONE: He touched him. He was feeling around on the ground and around the body. I didn't want to touch it because of the evidence but I thought that is where the mother-f—r is. I said "it's under his body." When I took the s— off of him I threw it on the ground, and then I told him to lay down on the ground, and he got down on his knees and got down. Sure enough it was right there. I rolled him over and it was under his f—g chest, and I said "we got it—let's get the f— out of here. Let's go call the police and then tell them about this body."

MILLER: You didn't call them though?

(BACKGROUND NOISE—INAUDIBLE TO REPORTER)

BLYSTONE: You ain't going to say nothing about this?

MILLER: What the f— do you think—even if I did.

(INAUDIBLE TO REPORTER)

MILLER: You know, if I don't find a job pretty soon, man, I'm going to f---g go steal something.

BLYSTONE: Murder is a real f---g experience. It's wild. She thinks it's wild.

MILLER: Did she freak out?

BLYSTONE: No, she's all right. She was worried for a few days. I was worried about her losing it, but she wasn't right there when I wasted him.

MILLER: She's still f---g involved.

AT THIS POINT THE TAPE WAS STOPPED BY THE OFFICER AND ADJUSTED.

JUDGE ADAMS: You may start the tape.

OFFICER STARTS TAPE AND THE TAPE RECORDING, AS HEARD BY THE COURT REPORTER, IS AS FOLLOWS:

BLYSTONE: George never believed me. When I used to say "I'll kill him" he'd look at me like "yeh, sure, okay," but now when I tell George "hey, I'll kill you, he looks at me like "this mother-f---r is going to kill somebody.

MILLER: He thinks you are for real, ain't it?

BLYSTONE: He think I'm for real.

MILLER: That you have the nerve?

BLYSTONE: When I tell him that I'll kill him, it don't mean I'm going to "beat you up or hurt you; it means I'm going to kill you," and Jackie looks at me different, you know.

MILLER: The only thing I'm really f---d up about, Scott, is—

BLYSTONE: It don't make you feel bad, Miles. It don't make you feel like an ogre.

MILLER: You don't dream about it or nothing, huh?

BLYSTONE: No. We laugh about it. Miles, it gives you a realization that you can do it, man.

MILLER: And get away with it.

BLYSTONE: You can walk up and—

MILLER: I hope this ain't your mom.

BLYSTONE: You can walk and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence, you know. Like, I mean I had confidence in myself before because I did it, but Jackie and George—they had doubt in their minds and I said "the mother-f---r does this, I'm going to kill him," but now when I say it to them—

MILLER: You just did it to prove it to them?

BLYSTONE: No, it was necessary. The guy could identify us, you know. It proved a point at the same time. He saw my face, Jackie's face, George's face, and he saw the car, you know, and we talked to him for five minutes before I even pulled the gun, and he was looking at us and all this s—.

MILLER: That freaks me out, man, that he didn't even try to get away.

BLYSTONE: He was so scared. When I was searching him, his body was shaking.

MILLER: He acted like he was stupid, man.

BLYSTONE: He might have tried to get away, you know, but like I said, I walked away from him out to where I could walk without making no noise, and I stood there for a minute—stood there, and I didn't make a sound and he didn't move, man. Then I made a noise and

said "don't think I'm gone." I said "I'm right here. You move and I'll kill you." Then I went back to the car and I said "look, I got to go back there and kill him," and I said "does anybody have any f---g beefs,"—no, kill him.

MILLER: Everybody said "kill him," huh?

BLYSTONE: Yeh. I ran back to the f---g guy and bent over him.

MILLER: And George even said "kill him?"

BLYSTONE: Yeh, George said "kill him."

MILLER: God damn.

BLYSTONE: And I f---g killed him—got back in the car

MILLER: You think he wouldn't say nothing because he didn't even want to go out with you.

BLYSTONE: He wanted to come. He run his mouth, like I am saying.

MILLER: He didn't want to go the second time?

BLYSTONE: To go back to see the body, yeh, he wanted to, but once he saw the body he realized. I don't know where he thought the blood might have come from—his brains, or you know, but it didn't him him, and when he was standing there p---g, Miles, his eyes were like—

MILLER: Glued on the guy?

BLYSTONE: He'd look at the guy and then look at me—(inaudible) and then when we lifted him up and George seen (inaudible).

MILLER: He must have had a lot of blood on him, all over his clothes and s---?

BLYSTONE: Right—blew his eye out—it was all over him.

MILLER: You should have took his jacket, man, to keep your ass warm (inaudible). I would have if I'd killed so somebody, man (inaudible).

BLYSTONE: (Inaudible), and like I said, the weirdest thing was his f---eyebrows. It looked like somebody took this f---r and beat him with a baseball bat in the face. The concussion, man, from them bullets hitting him from the back and then coming up and slamming against his skull and cheekbones and s--- and roof of the mouth, it looked like something off of a horror movie, —a monster. His eyebrows were out to here, his f---g cheekbones were out to here, his nose was real swollen and part of it was blown off—his teeth were gone. It blew his teeth—you could see his teeth sticking in the ground.

MILLER: Wasn't the wind blowing or anything that night to blow the f---g light out in your lighter?

BLYSTONE: It didn't blow it out. We both had a lighter. We were looking around like we were looking for I.D., but we wasn't.

MILLER: God damn (inaudible).

BLYSTONE: I saw the jacket—Dalton Smithburger—but don't tell nobody because they be related, you know. A guy might blow your f---g head off for just talking about.

MILLER: Yeh, I imagine—no s---.

BLYSTONE: He lives up in Farmington, I think. He lives up on the mountain somewhere—Farmington, Chalk Hill, or Markleysburg.

MILLER: Did he freak out when he seen you wasn't taking him up over the mountain?

BLYSTONE: Yeh, when I saw him there on that road there I was checking him out, you know, and I pulled over and he said "heading for the mountain" and I said "hey, we are going up there too" and he said "that's

good" and I said "but look I need some cash" and he said "well, I don't have much money." I pulled off down that road and then I said "look, if I go up this mountain I got to have some money because I won't be able to get back." I said "I don't mind taking you up but . . ."

MILLER: When did you put the f—g gun on him, man?

BLYSTONE: I'll tell you. I told him I was going to take him up because we were going ourselves, but I said "we got to have a way back," and he said "well, I got a few dollars on me," and I said "I don't know." He said "I can give you a few for gas" and then he started getting in his jacket and then I reached around Jackie and I said "put your f—g hands on the dashboard," and he said "oh, oh" and I said "put your f—g hands on the dashboard." I kept telling him, I warned him—I said "the more you open your eyes, the more trouble you are going to be in." He kept f—g trying, man. He kept sneaking looks. He'd see a lightpole coming by, you know, through his eyelids, and he would look up and look around to see where he was, and I said "mother-f—r, shut your f—g eyes, man." I knew when I pulled the gun I was going to kill him (inaudible). He saw the back of the car, you know.

MILLER: When did he do that?

BLYSTONE: When we picked him up. He came from the back and he could see it was a green Dart with a a f—g demolished rear end, and that ain't hard to f—g identify, and I told everybody—I said "look, if I would have killed that mother-f—r, we would be in jail right now." (Inaudible) All the guy had to do—he didn't have to say it was a Dart or Dodge. All he had to do was to say a green car with a mashed rear-end and they would pick me up as the driver.

MILLER: Yeh, 'cause there ain't none around.

BLYSTONE: Yeh, take me in front of him and he will say "that's the f—g guy right there—the guy who robbed me," so I told them the only thing to do was to f—g kill him. I said "do you want to end up in jail?" Believe me, if he was alive we'd all be in jail for armed robbery (inaudible). That's why I don't want to f— around any more. If I think that mother-f—r is going to identify me, or his being alive is going to hope me get caught or if I ain't going to have time to get away or something, I'm going to kill him. Then I know I can take my time. The next job I am thinking about doing—if I murder this guy, my intention is to dig a grave, but it was getting dark, and you called and Jackie called. I was going to dig one because I am ready to do the job which would help get my house, my apartment, have enough money for Christmas and (inaudible).

MILLER: I wish the f— you'd have sold me that gun, man. You f—g blew my job of making ten or twenty bucks.

BLYSTONE: Miles, I can't. It is a f—g murder weapon, you know.

MILLER: It ain't going no good out there, man.

BLYSTONE: No, but (inaudible) rather it not be used.

MILLER: Them guns, man—(inaudible) there is a left twist and there is a right twist, okay?

BLYSTONE: Most is right-twist.

MILLER: How many of them is there around that's got a right twist or a left twist? I mean, God damn, man, how in the hell can they match that up?

BLYSTONE: They have records of those bullets, okay. They did an autopsy on the guy. They have prints of those bullets, okay, in the unsolved crime files. Every time that a .22 is confiscated, they are going to try to

match it to who fired it, and they match it. When they match it, whoever has that gun is going to be charged with murder.

MILLER: How in the hell do you know if you got a right or a left twist?

BLYSTONE: Most guns have a right-hand twist. Very few guns have a left-hand twist. (Inaudible) have them. Most of them is right, but the bullet is—it really don't matter—right or left-hand twist. More what they look for is rifling grooves; you got (inaudible) grooves plus a firing pin. Every firing pin hits a case at a certain spot, like off-center, to the left, to the right, low or high or (inaudible) takes a certain shape of impression. With an automatic, with a .45—a lot of people don't know this—when you chamber a .45 you throw your clip in there—chamber one, and that fires—well, if you fire or whatever, when you eject that f—g thing, you leave what is called "chamber marks" on your casing. They can identify—they can match the gun up with the chamber it came out of with the bullets just by the little scratches and s— because every chamber puts a different mark on it—every firing pin puts a different mark (inaudible). A lot of people think "well, I'll change the barrel and they will never know," but they will match the firing pin and the chamber, especially in an automatic. Same thing with bolt rifles. If you had a microscope, you could look, chamber six or seven rounds, jack them out and line them up on a microscope and see if they all match up, scrape marks, everything.

MILLER: So even if they did find that gun—let's say they did find that God damn gun—I am getting ready to take off, man.

BLYSTONE: I want to take a p—.

MILLER: Even if they did find the gun—that's not saying that they can f—g match it up according to what they say.

BLYSTONE: They can.

MILLER: They can—how?

BLYSTONE: What they do, they have it on file, man; it is like an x-ray.

MILLER: Inaudible.

BLYSTONE: What they do is when they got a murder, they will take pictures of the bullets.

MILLER: Inaudible.

BLYSTONE: (Inaudible)—and every time they find a .22, and they confiscated it for murder, it will go to the unsolved cases (inaudible) with .22's. They are going to go through the .22 unsolved murders and they are going to fire a bullet into those ballistic (inaudible) and all they got to do—they probably got 20, 30 unsolved .22 murder cases, right—they just take it and check it, and when they get one, you are—(inaudible).

MILLER: I'm going to take off, man (inaudible)—I don't know whether it does any good whether I go home or not, man. I go home and she's (inaudible) and I go to Frank's, you know what I mean, because she is always there. Either she is there, or I go there and Frank and them tell me that she just left, and I know they are lying, you know what I mean—I know they are lying because I'll sit up the road sometimes and smoke a cigarette because I figure that I'm going to go home and she is not going to be there, and then tell me bull-s— like that, and guaranteed, man, I've stood up the road and smoked a cigarette. Didn't you see her? Bull-s—; that's bull-s— man.

AT THIS POINT THE OFFICER TURNS OFF THE TAPE.

DISSENTING OPINION

JUSTICE ZAPPALA FILED: OCTOBER 17, 1988

Because I disagree with the majority opinion's conclusion regarding the constitutionality of the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 et. seq., I must dissent.

Since the majority sets forth the actual provisions of the Act, it is only necessary to summarize the Act. Under the Act, with the consent of a participating individual, the government may electronically eavesdrop upon a person using a body tap upon the approval of the Attorney General, the District Attorney or their enumerated authorized agents. Noticeably missing from the Act is a requirement that a disinterested judicial officer review the facts to ascertain whether probable cause exists for the intercept. It is the failure to provide for the later requirement which causes me to conclude that this part of the Act is unconstitutional. The consensual interception authorized by § 5704 amounts to a search and seizure requiring either a warrant or probable cause as required by Article I, section 8 of our Constitution.

There is no question that the interception of an oral communication is considered a "search and seizure" as those terms are constitutionally defined under both the federal and state constitutions. See, *Katz v. U.S.*, 389 U.S. 349, 19 L.Ed.2d 576, 88 S. Ct. 507 (1967); *Commonwealth v. White*, 459 Pa. 84, 327 A.2d 40 (1974). As the majority correctly points out, in interpreting the Fourth Amendment's protection against unreasonable searches and seizures, the United States Supreme Court has taken the approach that one party consensual interceptions do not violate that provision since an accused waives his "expectation of privacy" by conversing with another party. In short, the United States Supreme Court

and the majority can discern no difference between communicating with the police informant who in turn reports to the police and surreptitiously recording the conversations directly by interception. This analysis embodies the proposition that the key factor to be considered in a wire intercept is whether the individual has a "legitimate expectation of privacy" and whether he has waived that expectation by disclosing information to any other party. While on the surface the majority's reliance upon the federal court's position seems to have merit, closer analysis reveals that blind adherence to this proposition is erroneous.

In its rush to adopt federal jurisprudence to support its position, the majority merely pays lip service to the admonitions of Mr. Justice Brennan of the United States Supreme Court which we heeded and embraced in *Commonwealth v. Sell*, 504 Pa. 46, 49, 470 A.2d 457, 459 (1983):

[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

In refusing to adopt the United States Supreme Court abolition of "automatic standing" under the Fourth Amendment of the Federal Constitution in *Sell*, we reaffirmed our prior holding that the:

state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the right so guaranteed may be more expansive than their federal counterparts. (Citations omitted)

Commonwealth v. Tate, 495 Pa. 158, 169, 432 A.2d 1382, 1387 (1981). In *Sell*, we then analyzed the federal case law limiting standing under the Fourth Amendment against the evolution of protected liberties guaranteed by Article I, section 8 of our own constitution and had no problem in rejecting the federal analysis of "automatic standing" under our comparable constitutional clause.

It is also important to note that in *Commonwealth v. Sell*, *supra*, we upheld the overriding importance of "privacy" under our constitution:

In construing Article I, section 8, we find it highly significant that the language employed in that provision does not vary in any significant respect from the words of its counterpart in our first constitution. The text of Article I, section 8 thus provides no basis for the conclusion that the philosophy and purpose it embodies today differs from those which first prompted the Commonwealth to guarantee protection from unreasonable governmental intrusion. Rather, the survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.

504 Pa. 65, 470 A.2d 467. Thus, unlike our federal counterparts, the right to privacy has been elevated to a paramount right guaranteed to every citizen of this Commonwealth. This paramount status was even acknowledged by the legislature in defining an "oral communication" under the Act.

"Oral communication." Any oral communications uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.

18 Pa.C.S. § 5701. If a person has a legitimate expectation of privacy, that paramount right should not be infringed upon without a corresponding justification.

Both the majority and the United States Supreme Court adhere to the view that a "person cannot have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversations to the police." (Citations omitted) (Slip Opinion, p. 12). The majority adopts the federal rational without offering any persuasive argument for doing so. Under the majority view, a person could *never* be sure of having a confidential conversation with another. Communicating in and of itself would waive any right of privacy. As is evident, such an approach has a chilling effect, relegating the right of privacy to nothing more than a useless ideal which could only be exercised when one is alone.

I find comfort and support for my position in this appeal from a recently decided decision of the Supreme Court of Oregon. See *State of Oregon v. Roger Jonathan Scott Campbell*, 306 Ore. 157; 1988 Ore. LEXIS 400 (filed July 12, 1988); Accord, *Commonwealth v. Blood*, 400 Mass. 61; 507 NE2d 1029 (1987) (Similar Massachusetts interception statute held unconstitutional as being unreasonably intrusive to impose risk of electronic surveillance on every act of speaking aloud to another person). In *Campbell*, the court was faced with the question of whether or not under its state constitution, police use of a radio transmitter to locate a private automobile to which the transmitter had been surreptitiously attached is a "search or seizure". In rejecting the state's argument that the court should embrace the decisions of the United States Supreme Court which validated such a

use, the court boldly disassociated itself from the United States Supreme Court's decisions allowing such a monitoring, *United States v. Knott*, 460 U.S. 276, 103 S. Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Karo*, 468 U.S. 705, 104 S. Ct. 3296, 82 L.Ed.2d 530 (1984) because the United States Supreme Court's interpretation in those cases did not comport with the interpretations of the Oregon Supreme Court regarding search and seizure and privacy protection as set forth in Article I, § 9 of the Oregon Constitution. After finding that privacy is an interest protected by Article I, § 9 of its state constitution the court discussed blind adherence to federal jurisprudence.

Even were the provisions identical, this court would nonetheless be responsible for interpreting the state provision independently, though not necessarily differently. Majority opinions of the Supreme Court of the United States may be persuasive, but so may concurring and dissenting opinions of that court, opinions of other courts construing similar constitutional provisions, or opinions of legal commentators. **What is persuasive is the reasoning, not the fact that the opinion reaches a particular result.** (Emphasis supplied)

Oregon v. Campbell, 1988 Ore. LEXIS 400 at p. 6.

After a thorough review resulting in the rejection of the United States Supreme Court's reliance on reasonable expectation of privacy analysis, the Oregon Court considered the argument that information legitimately available through one means may be obtained through any other means without engaging in a search. In the court's poignant rejection of that premise it determined that:

[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or "private", secret from the government. (Citations omitted)

What the provisions forbid are unreasonable searches and seizures, i.e., certain acts of the government. Article I, section 9 "presents the police with a web of rules that are meant to protect the privacy interests of "the people", and the police violate section 9 if and only if they violate these rules. *State v. Tanner*, 304 Ore. at 320. Whether police conduct is a search does not turn on whether its object could be discovered by conduct that is not a search. For example, in *State v. Lewis*, *supra*, the defendant exposed himself to public view through his living room. This Court held that the police officers did not engage in a search by photographing him from a house across the street with a 135 m.m. camera lense, which provided only minimal enhancement of what could be observed with the unaided eye. Nonetheless, *the police officers would have engaged in a search had they entered his living room to observe what could be observed from the street.* Similarly, if an undercover police officer is invited into a home and observes illegal conduct, the officer has not committed a search, but an unconsented entry into the home by other police officers to observe what the undercover officer could or did not observe *would be a search*. The issue is not whether what the police learned by using the transmitter in this case was "exposed to public view", but whether using the transmitter is an action that can be characterized as a search.

...

The problem presented by this case is essentially much like that presented in *Katz*, which was whether using a hidden listening device placed in a public place could be considered a search. Conversations in public may be overhead, but it is relatively easy to avoid such eavesdroppers by lowering the voice or moving away. Moreover, one can be reasonably sure of whether one will be overheard. But if the state's

position in this case is correct, no movement, no location and no conversation in a "public place" would in any measure be secure from the prying of the government. There would in addition be no ready means for individuals to ascertain when they were being scrutinized and when they were not. That is nothing short of a staggering limitation on personal freedom. We could not be faithful to the principles underlying Article I, section 9 and conclude that such forms of surveillance were not searches.

Id. at p. 12.

Even accepting arguendo, the majority's logic regarding the expectation of privacy, I am perplexed as to why a conversation between two nonconsenting persons is entitled to all the protections embodied in the federal amendment while a conversation with one consenting to eavesdropping does not. If the key element is the expectation of privacy, then the consent of one participant is insufficient. Unlike the majority, I fail to see the distinction between having the consent of one participant or none as the polestar in guaranteeing a fundamental right. Furthermore, I cannot accept the majority's conclusion that one who communicates to another does so at the expense of his privacy rights. Implicit in the right to privacy is the right to determine who benefits from your knowledge. Knowledge is as much a possessory right as the right to possess and protect our homes and personal property. An individual then may desire not to expose his inner thoughts or ideals to the public at large which he may not trust, but only to selected individuals. Of course, he takes the risk that a friend may betray him and his confidences, but that risk is one that he individually and knowingly assumes. Under such circumstances, he voluntarily chooses to limit his privacy.

Finally, taking the majority's reasoning to its logical extreme, if there is no difference between directly intercepting oral communications and receiving and recording

information from an informant, then there will be no difference in directly probing and tapping the innermost thoughts of individuals in the future with the advent of more sophisticated electronic equipment. If the ends justify the means and the goal is to prevent criminal activity at the expense of individual liberties, then, under the majority's interpretation, I see no way to prevent intercepting thoughts even before they are orally and publicly communicated.

Accepting the importance of the right to privacy, as the majority must, the issue still becomes whether the governmental intrusion is reasonable, not whether an individual possesses an expectation of privacy. We have specifically rejected the United States Supreme Court's analysis of the legitimacy of privacy as a key element in interpreting Article I, section 8 of this Commonwealth's Constitution. Instead, we have held that our primary concern is the reasonableness of the intrusion. *Commonwealth v. Sell*, *supra*.

In other areas of criminal law we have consistently held that a warrantless search or a search pursuant to a warrant must be based upon probable cause. To ensure an objective determination of whether the intrusion is supported by probable cause, we have required a disinterested judicial officer to review the facts either preliminarily, in the case of a search pursuant to a warrant, or subsequently, in the case of a warrantless search, to determine if sufficient facts were present to establish probable cause that criminal activity was occurring. This neutral determination suffices to protect a person from an unjustifiable intrusion. Under § 5704(2)(ii), however, the legislature has impermissibly taken the "probable cause" determination from the judiciary and given that determination to a law enforcement official who cannot be said to be either neutral or detached. In *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987), we specifically rejected the approach now taken by the ma-

majority in balancing the individual and governmental interests to be protected in determining whether a search was reasonable. Instead, we held that a determination that probable cause existed for the search supported a finding that the search was reasonable. Without such a neutral determination the search would be unreasonable.

Based upon the foregoing analysis, I cannot accept the constitutionality of § 5704 of the Act. I am cognizant of the principles that a statute is presumed to be constitutional and that the legislature does not intend to promulgate unconstitutional legislation. 1 Pa.C.S. § 1922(3). However, when a statute so blatantly ignores a liberty entrenched in our body of laws for over 200 years, that presumption must necessarily fall. Unlike the Superior Court's approach in *Commonwealth v. Schaeffer*, — Pa. Super. —, 536 A.2d 354 (1987), I cannot in good conscience redraft the statute to include a requirement so basic to our system of justice to achieve a desired result. See 1 Pa.C.S. § 1921(b). It is clear to me that given the importance of the right to privacy in our jurisprudence, as even acknowledged by the legislature in this Act, I cannot conclude otherwise than that the legislature did not intend for a disinterested objective determination of probable cause prior to intercepting oral communications. See 1 Pa.C.S. § 1921(a). Therefore, I would find Section 5704 unconstitutional and remand this matter to the trial court for a new trial during which the information obtained pursuant to the Act would be suppressed.¹

Mr. Justice Larsen joins in this dissenting opinion.

¹ President Judge Cirillo of the Superior Court has written a rather lengthy and scholarly opinion on this issue in *Commonwealth v. Schaeffer*, *supra*. Except for his reasoning on the constitutionality of § 5704 of the Act, I note with approval his analysis of the issue and would incorporate his opinion into this one.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 37 W.D. Appeal Docket, 1986

COMMONWEALTH OF PENNSYLVANIA

v.

SCOTT WAYNE BLYSTONE,

Appellant

Appeal from the Judgments of Sentence
of the Court of Common Pleas of Fayette County,
Criminal Division, at Nos. 2, 2 1/4, 2 2/4 & 2 3/4 of
1984, entered on April 17, 1986

Argued: March 9, 1987

Reargued: March 7, 1988

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the convictions of the Court of Common Pleas of Fayette County, Criminal Division, of murder of the first degree, robbery, and criminal conspiracy to commit those offenses are sustained and the sentences of death and ten to twenty years imprisonment are affirmed.

/s/ Irma T. Gardner
IRMA T. GARDNER
Deputy Prothonotary

Dated: October 17, 1988

SUPREME COURT OF THE UNITED STATES

No. 88-6222

SCOTT WAYNE BLYSTONE,
Petitioner

v.

PENNSYLVANIA

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Pennsylvania, Western District is granted and is limited to Question II presented by the petition.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 27, 1989

(6)
No. 88-6222

Supreme Court, U.S.
FILED

JUN 7 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SCOTT WAYNE BLYSTONE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme
Court Of The Commonwealth Of Pennsylvania

BRIEF OF PETITIONER

*PAUL R. GETTLEMAN
R.D. 1, Box 325
Zelienople, PA 16063
(412) 521-0500

BRUCE S. LEDEWITZ
School of Law, Hanley Hall
Duquesne University
900 Locust Street
Pittsburgh, PA 15282
(412) 434-5011

STEFAN PRESSER
125 S. 9th Street, Suite 701
Philadelphia, PA 19107
(215) 592-1513

Attorneys for Petitioner

**Counsel of Record*

QUESTION PRESENTED

Whether the mandatory feature of the Pennsylvania death penalty statute—which required a death sentence for Mr. Blystone when the jury found one aggravating circumstance and no mitigating circumstances—created a risk that Mr. Blystone was unreliably sentenced to death in violation of the Eighth Amendment, because it precluded his jury from deciding whether the sole aggravating circumstance actually warranted the death penalty, because it increased the risk that the jury would give no consideration to unenumerated mitigating circumstances, and because it allowed for a life sentence only if his jurors were willing to disobey the instructions they were given?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii, iv
OPINION BELOW.....	1
JURISDICTIONAL GROUNDS.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	10
I. AS APPLIED IN PETITIONER'S CASE, THE JURY INSTRUCTIONS REQUIRED BY THE PENNSYLVANIA DEATH PENALTY STATUTE PRECLUDED AN INDIVIDUALIZED DETERMINATION THAT DEATH WAS THE APPROPRIATE SENTENCE AND CREATED AN UNCONSTITUTIONAL RISK THAT DEATH WAS IMPOSED IN DISREGARD OF FACTS CALLING FOR A LESSER SENTENCE	10
A. Introduction: The Eighth Amendment Requires That The Sentencing Decision In A Capital Case Be Individualized And Reliable	10
B. The Mandatory Feature of Mr. Blystone's Jury Instructions Precluded The Jury From Evaluating The Weight Of The Particular Aggravating Circumstance Found In His Case	15
C. The Mandatory Feature Of The Sentencing Instructions Unconstitutionally Limited The Jury's Consideration Of Unenumerated Mitigation	22
D. The Mandatory Feature Of The Instructions Interjected Unreliability Into Mr. Blystone's Sentencing Proceeding	27
CONCLUSION.....	31

TABLE OF AUTHORITIES

Case	Page
<i>Andres v. United States</i> , 333 U.S. 340 1 (1948)	19
<i>Barclay v. Florida</i> , 463 U.S. 949 (1983).....	17, 20, 27
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	11, 12, 28
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	8, 28
<i>California v. Brown</i> , 479 U.S. 538 (1987)	31
<i>California v. Ramos</i> , 463 U.S. 992 (1983).....	13, 16, 27
<i>Commonwealth v. Beasley</i> , 504 Pa. 485, 475 A.2d 730 (1984)	29
<i>Commonwealth v. Blystone</i> , 549 A.2d 81 (1988)....	1, 7, 29
<i>Commonwealth v. Buehl</i> , 510 Pa. 363, 508 A.2d 1167 (1986)	25
<i>Commonwealth v. Frey</i> , 504 Pa. 428, 475 A.2d 700 (1984)	24
<i>Commonwealth v. Holcomb</i> , 508 Pa. 425, 498 A.2d 833 (1984).....	18, 19
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)....	10, 11, 12, 22
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	31
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	11
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	12
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	18, 21
<i>Hitchcock v. Dugger</i> , 95 L.Ed.2d 347 (1987)....	9, 12, 14, 22
<i>Johnson v. Mississippi</i> , 100 L.Ed.2d 575 (1988).....	11, 28
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	12
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	8, 9, 12, 13, 28
<i>Lowenfield v. Phelps</i> , 98 L.Ed.2d 568 (1988).....	12, 16
<i>Maynard v. Cartwright</i> , 100 L.Ed.2d 372 (1988)....	12, 16
<i>McCaskill v. State</i> , 344 So.2d 1276 (Fla. 1977).....	18
<i>McCleskey v. Kemp</i> , 95 L.Ed.2d 262 (1987)	22
<i>Mills v. Maryland</i> , 100 L.Ed.2d 384 (1988).....	12, 19, 24
<i>Proffitt v. State</i> , 510 So.2d 896 (Fla. 1988).....	18
<i>[Harry] Roberts v. Louisiana</i> , 431 U.S. 633 (1977)	12
<i>[Stanislaus] Roberts v. Louisiana</i> , 428 U.S. 325 (1976).....	10, 12, 18, 30
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	19
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986).....	13
<i>Sumner v. Shuman</i> , 97 L.Ed.2d 56 (1987)....	8, 12, 14, 17
<i>Turner v. Murray</i> , 476 U.S. 28 (1986)	28
<i>Winston v. United States</i> , 172 U.S. 303 (1899)	21
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)....	passim
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983).....	12, 13, 27

Table of Authorities Continued

STATUTES	Page
42 Pa. C.S. § 9711 (c)(iii)	22
42 Pa. C.S. § 9711 (c)(iv)	22
42 Pa. C.S. § 9711 (e)	22
42 Pa. C.S. § 9711 (e)(2)	23, 25
42 Pa. C.S. § 9711 (e)(3)	25
42 Pa. C.S. § 9711 (e)(4)	24
42 Pa. C.S. § 9711 (e)(5)	23, 26
42 Pa. C.S. § 9711 (e)(8)	23, 26

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania affirming Mr. Blystone's conviction and sentence of death is reported as *Commonwealth v. Blystone*, ____ Pa. ____, 549 A.2d 81 (1988). It is set forth in the Joint Appendix (hereafter, "J.A.") at pages 94-149.

JURISDICTIONAL GROUNDS

The Court has jurisdiction under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Pennsylvania was entered on October 17, 1988, and a timely petition for certiorari was filed on December 16, 1988. Certiorari was granted on March 27, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted.

[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

This case also involves the following provisions of the Pennsylvania Consolidated Statutes: 18 Pa. C.S. § 2502 (murder of the first degree) and 42 Pa. C.S. § 9711 (sentencing procedure in capital cases). Because of their length, these provisions are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

On the night of September 9, 1983, Scott Blystone, his girlfriend and another couple were out for a drive. During the course of the evening, Blystone bought a fifth of

whiskey. R. 24-B. At approximately 11:00 P.M. he observed Dalton Smithburger hitchhiking. R. 102. Blystone told his companions that he intended to pick Smithburger up in order to rob him. R. 5-B-6-B. Blystone pulled over and offered Smithburger a ride; Smithburger accepted. R. 6-B.

After restarting the car Blystone informed Smithburger of their need for gas and asked him to contribute to its purchase. R. 6-A. Disbelieving Smithburger's response that he had only a few dollars, Blystone drew out a pistol. R. 7-B, 102. After a short drive Blystone ordered Smithburger out of the car, saying that all he wanted was cash. R. 8-B. At gun point, he walked Smithburger into a field adjacent to the road. R. 9-B. There he searched Smithburger and took all of his money, amounting to some thirteen dollars. R. 103. He told Smithburger to lie face down while he returned to the car. R. 104. At the car Blystone told his companions that he was concerned that Smithburger could identify them. R. 9-B, 104. He asked how they would feel about killing Smithburger. R. 104. According to Blystone's account to a friend thereafter, "Everybody said 'yeh, go ahead, kill him'" R. 104.¹ Blystone returned to the field and asked Smithburger what he remembered about the car. R. 104-105. Smithburger replied that he recalled its color and that its rear had been damaged. R. 105. Blystone then shot and killed him. R. 105.

In the guilt phase of Blystone's trial in the Court of Common Pleas of Fayette County, the Commonwealth

¹ The recollection of two of the others in the car was similar. Barbara Clark testified that the response was "do whatever you want to do," R. 10-A, and Jackie Guthrie, that it was "do whatever you have to do," R. 10-B.

proved these events by the testimony of Blystone's companions and an audiotape of a conversation between Blystone and a police informant. R. 100-120. Blystone presented no evidence. The jury convicted him of first degree murder, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery. R. 138-39.²

Immediately following the guilty verdict, a sentencing hearing was held pursuant to 42 Pa. C.S. § 9711. R. 139. No additional evidence was presented by the Commonwealth or by Blystone. R. 140-44. In closing argument, the prosecutor asked the jury to find a single aggravating circumstance: that "[t]he defendant committed a killing while in the perpetration of a felony," 42 Pa. C.S. § 9711 (d)(6). R. 146. The prosecutor argued that this circumstance was already established by Blystone's conviction of robbery. R. 146.

The prosecutor told the jury that,

Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty. . . .

R. 2.³ Thereafter he reiterated,

You must determine from the evidence presented in this courtroom whether or not there are any mitigat-

² First degree murder in Pennsylvania requires an "intentional killing," defined as a "willful, deliberate and premeditated killing." 19 Pa. C.S. § 2502.

³ The prosecutor's closing penalty phase argument is set forth in a separately paginated volume which was transcribed on April 16, 1985.

ing circumstances. If not, you must impose the death penalty.

Ibid.

The trial judge instructed the jury,

[T]here is only one aggravating circumstance that you could find, and that is that the killing occurred in the commission of the felony of robbery, if you find this occurred beyond a reasonable doubt. If you find that there is an aggravating circumstance, and you must unanimously find it, you would then need to determine if there were any mitigating circumstances, which I will explain to you.

R. 148. Tracking 42 Pa. C.S. § 9711 (c)(1)(iv), whose constitutionality Blystone unsuccessfully challenged on the ground that it provided for mandatory capital sentencing,⁴ the trial judge then charged the jury that it was obliged to return a death sentence under certain circumstances and to return a life sentence under other circumstances:

If you find an aggravating circumstance and no mitigating circumstance, it is your duty to return a verdict of death. If you find that there are mitigating circumstances, then you would need to determine whether the aggravating circumstance or aggravat-

⁴ 42 Pa. C.S. § 9711 (c)(1) provides:

Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

....

- (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

ing circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty. If you find no aggravating circumstances, you must return the penalty of life imprisonment, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you must return life imprisonment.

Ibid.

With regard to mitigating circumstances the judge instructed:

These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.

R. 149. "In order to consider [mitigating circumstances]," the judge told the jury, it "would have to find evidence that would justify the finding of mitigating circumstances." R. 148-49, and would have to make "that finding of mitigating [sic] . . . by a preponderance of the evidence," R. 149. Mitigating circumstances, he reiterated, "are only applicable if proven by a fair preponderance of the evidence." R. 149. Summing up the jury's duty in

considering aggravating and mitigating circumstances, the judge concluded that,

Your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases your verdict must be a sentence of life imprisonment.

R. 150.

After approximately half an hour of deliberation, the jury requested re-instruction on "what constitutes a mitigating circumstance." R. 153. The judge repeated the same list of eight mitigating circumstances, *id.*, and explained the relationship between the first seven circumstances and the eighth ("any other mitigating matter") by saying: "The first seven are the specific matters you could consider. The last is the catch-all—any other mitigating circumstances that result from the character and record of the defendant or the circumstances of the case." R. 153-54. A juror asked for further instruction on the "any other" mitigating circumstance, and the judge responded:

It states "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." This is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance, but it should be, in determining it, something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense. If you find anything in these that you consider to be mitigating, you might consider them, and then you would weigh whatever you found to be mitigating against whatever you found to be aggravating, if you found aggravating.

R. 154.

After further deliberation, the jury returned a verdict of death, based on the finding of one aggravating circumstance—murder during the commission of a robbery—and no mitigating circumstances. R. 155-56.

On direct appeal, the Pennsylvania Supreme Court affirmed the judgment of conviction and sentence of death. *Commonwealth v. Blystone*, ___ Pa. ___, 549 A.2d 81 (1988); J.A. 94. It rejected Blystone's contention that the statutorily prescribed jury instructions operated in his case to require a mandatory death sentence in violation of the Eighth and Fourteenth Amendments. J.A. 94.

SUMMARY OF ARGUMENT

In its application to Mr. Blystone's case, the Pennsylvania death penalty statute violated settled Eighth Amendment rules. As the instructions to Mr. Blystone's jury made clear, there is a mandatory feature to Pennsylvania's capital sentencing scheme. The jury "must" return a verdict of death if it finds—as Mr. Blystone's jury did—one or more aggravating circumstance(s) and no mitigating circumstances. Without further instructions regarding the jury's responsibility to evaluate all of the facts about the crime and the defendant as the basis for its sentencing choice, this mandatory feature created a substantial risk that the decision to sentence Mr. Blystone to death was not the result of an individualized determination that death was the appropriate sentence.

One of the fundamental principles of the Court's Eighth Amendment jurisprudence is that procedures providing for imposition of the death penalty must satisfy "the Eighth Amendment's 'heightened need for reliability in

the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985). The most consistent application of this principle has been to assure that the capital sentencer is not legally precluded from considering "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Capital sentencing reliability is jeopardized in two ways when a state forbids the lawful consideration of these kinds of evidence. First, there is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. Second, juries forbidden to give lawful consideration to powerful sentencing factors may consider them unlawfully, with results that are unreliable precisely because they are legally ungoverned and subject to the whim of the particular jury. *Woodson v. North Carolina*, 428 U.S. 280, 302-303 (1976) (plurality opinion). The reliability of the decision to impose death in Mr. Blystone's case was jeopardized in both of these ways.

Two deficiencies in the sentencing phase instructions created the risk that factors calling for a life sentence were not taken into account. First, the jury was not instructed to consider whether the aggravating circumstance that it found was sufficient to call for the death penalty. Yet, "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending upon the nature of the [aggravating circumstance]." *Sumner v. Shuman*, 97 L.Ed.2d 56, 69 (1987). The jury could have found that Mr. Blystone was not sufficiently culpable to be sentenced to death solely because he had committed a murder during the course of a

robbery. However, the instructions precluded the jury from making this judgment in his sentencing proceeding. Second, the jury was not instructed to consider as unenumerated, "other" mitigating circumstances facts which were relevant to, but failed to establish, any of Pennsylvania's seven enumerated mitigating circumstances. It is likely in this situation that the mandatory feature of the sentencing scheme foreclosed the jury's consideration of pertinent unenumerated mitigating circumstances in deciding Mr. Blystone's sentence. See *Hitchcock v. Dugger*, 95 L.Ed.2d 347 (1987).

The reliability of Mr. Blystone's death sentence was also undermined by the lawless sentencing process engendered by Pennsylvania's prohibition of the lawful consideration of relevant evidence. In fifty cases tried under the current Pennsylvania death penalty statute, the sentencing juries have found, as did Mr. Blystone's jury, one aggravating circumstance and no mitigating circumstances. Under the Pennsylvania statute, and the instructions in each of these cases, a death sentence should have been imposed in each case. However, death has been imposed in only twelve of these cases. Mr. Blystone's case is one of the twelve.

This is not a pattern produced by isolated, aberrant acts of mercy on the part of maverick juries. It is the product of a procedure so rigid in its unresponsiveness to relevant sentencing considerations that it forces juries routinely to respond outside the law. Whether because the aggravating circumstance that was found was illegally weighed and deemed not to warrant death on the facts of the particular case or because mitigation excluded by the statutory categories was illegally considered, juries told that they could not give effect to "factors" calling "for a less severe penalty," *Lockett v. Ohio*, 438 U.S. at 605,

within Pennsylvania's mandatory capital sentencing rules have proceeded systematically to break the rules.

A sentencing system which thus compels the actual decisionmaking process to operate extralegally cannot assure reliability in the determination that death is the appropriate sentence in any specific case. "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts v. Louisiana*, 428 U.S. 328, 335 (1976) (plurality opinion). Mr. Blystone's sentence, imposed by a jury which was unwilling to disobey the instructions, cannot stand as a reliable determination that death was the appropriate sentence for him.

ARGUMENT

AS APPLIED IN PETITIONER'S CASE, THE JURY INSTRUCTIONS REQUIRED BY THE PENNSYLVANIA DEATH PENALTY STATUTE PRECLUDED AN INDIVIDUALIZED DETERMINATION THAT DEATH WAS THE APPROPRIATE SENTENCE AND CREATED AN UNCONSTITUTIONAL RISK THAT DEATH WAS IMPOSED IN DISREGARD OF FACTS CALLING FOR A LESSER SENTENCE

A. Introduction: The Eighth Amendment Requires That The Sentencing Decision In A Capital Case Be Individualized And Reliable

As the Court explained in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), "[s]ince the early days of the common law, the legal system has struggled to accommodate . . . twin objectives" in developing a system of capital punishment to be "at once consistent and principled but also humane and sensible to the uniqueness of the individual." In its 1976 decisions, the Court recognized that the objective of consistency could not be satisfied by mandatory

death sentences, because their inflexibility not only disregarded the uniqueness of the individual but also undermined the very principle that the Court sought to promote: the "consistency" that such mandatory death sentences produced "by ignoring individual differences[,] is a false consistency." *Eddings v. Oklahoma*, 455 U.S. at 112. Indeed, the mechanistic rigidity of mandatory death-sentencing schemes is one of the principal reasons why such schemes do "not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a death sentence." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion). Mandatory death sentences' failure to provide a sufficiently flexible legal framework to permit the rational consideration of pertinent sentencing considerations in specific cases inevitably invites juries to ignore the law when those considerations are compelling; and there is "no way . . . for the judiciary to check [this] arbitrary and capricious exercise of power through a review of death sentences." *Ibid.*

Since 1976, the Court's Eighth Amendment cases have accommodated the concerns for a consistent, principled administration of the death penalty and for a humane appreciation of the uniqueness of the individual by developing the over-arching concept that the Amendment stands to assure "reliability in the determination that death is the appropriate punishment" in any capital case." *Johnson v. Mississippi*, 100 L.Ed.2d 575, 584 (1988). See, e.g., *Woodson v. North Carolina*, *supra*, 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 447 U.S. 625 (1980). Because reliability is jeopardized by an unchanneled sentencing process, the Court has insisted that capital statutes "'genuinely narrow the

class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Lowenfield v. Phelps*, 98 L.Ed.2d 568, 581 (1988). See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 100 L.Ed.2d 372 (1988). Because reliability is jeopardized by disregarding pertinent sentencing factors, the Court has insisted that “consideration of the character and record of the individual offender and the circumstances of the particular offense [is] . . . a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, *supra*, 428 U.S. at 304 (plurality opinion). See, e.g., [*Harry*] *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam); *Hitchcock v. Dugger*, 95 L.Ed.2d 347 (1987).

Thus have emerged the two bedrock principles of capital Eighth Amendment jurisprudence. Any death-penalty scheme must provide for an *individualized* sentencing decision. E.g., *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Woodson v. North Carolina*, *supra*; [*Stanislaus*] *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Eddings v. Oklahoma*, *supra*; *Sumner v. Shuman*, 97 L.Ed.2d 56 (1987). It must also provide a *rational framework* which assures consistency in decisionmaking. *Godfrey v. Georgia*, *supra*; *Zant v. Stephens*, 462 U.S. 862 (1983); *Cartwright v. Maynard*, *supra*. Guided by these twin principles, the Court has uniformly invalidated procedures that threaten the reliability of capital adjudications by depriving judges and jurors of the capacity to make a reasoned, graduated response to the facts of individual cases. E.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Beck v. Alabama*, *supra*; *Mills v. Maryland*, 100 L. Ed. 2d 384 (1988).

Under a capital sentencing procedure that relies upon aggravating and mitigating circumstances to channel

decisionmaking, consistency and principled application of the death penalty are assured primarily through the legislature’s articulation of the aggravating circumstances. Through “legislative definition,” the statutory aggravating circumstances “circumscribe the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. at 878. Humaneness and sensitivity to the uniqueness of the individual are then assured by an individualized sentencing determination for any person who is a member of the death-eligible class. Such a sentencing process requires “an *individualized* determination [of sentence] on the basis of the character of the individual and the circumstances of the crime.” *Id.* at 879 (emphasis in original). See, e.g., *Lockett v. Ohio*, *supra*; *Skipper v. South Carolina*, 476 U.S. 1 (1986). Writing for the Court in *California v. Ramos*, 463 U.S. 992 (1983), Justice O’Connor described the requisites of a constitutional death sentencing procedure in the following terms:

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury’s choice between life and death must be individualized.

Id. at 1008.

In its application to Mr. Blystone’s case, the Pennsylvania death penalty statute has violated these settled Eighth Amendment rules. As the instructions to Mr. Blystone’s jury made clear, there is a mandatory feature to Pennsylvania’s capital sentencing scheme. The jury “must” return a verdict of death if it finds—as Mr. Blystone’s jury did—one or more aggravating circumstance(s) and no mitigating circumstances. Without fur-

ther instructions regarding the jury's responsibility to evaluate all of the facts about the crime and the defendant as the basis for its sentencing choice, this mandatory feature creates a substantial risk that in cases like Mr. Blystone's the decision to impose death will not be the result of an individualized determination that death is the appropriate sentence.

This risk arose in Mr. Blystone's case in two specific ways. First, the jury was not instructed to consider whether the aggravating circumstance that it found was sufficient to call for the death penalty. Yet, "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending upon the nature of the [aggravating circumstance]," *Sumner v. Shuman*, *supra*, 97 L.Ed.2d at 69. The jury could have found that Mr. Blystone was not sufficiently culpable to be sentenced to death solely because he had committed a murder during the course of a robbery. However, the instructions precluded the jury from making this judgment. Second, the jury was not instructed to consider as unenumerated, "other" mitigating circumstances facts which were relevant to, but failed to establish any of Pennsylvania's seven enumerated mitigating circumstances. It is likely in this situation that the mandatory feature of the sentencing scheme foreclosed the jury's consideration of pertinent unenumerated mitigating circumstances in deciding Mr. Blystone's sentence. See *Hitchcock v. Dugger*, *supra*.

Such a sentencing procedure is rife with the dangers that have caused this Court to disallow other forms of mandatory capital punishment. Not only is the jury forbidden to give lawful effect to the existence of facts that are rationally relevant to its sentencing options, but is compelled to give unlawful effect to those facts (by violating the Court's instructions) if it chooses to acknowledge

them at all. As the Court recognized in *Woodson v. North Carolina*, *supra* 428 U.S. at 293, 294 n.29, mandatory sentencing schemes give rise to the possibility of arbitrary and unreliable jury responses. When a jury believes that death is not the appropriate sentence in a particular case but feels constrained to impose death if the court's instructions are followed, the jury may disregard the instructions and impose life anyway. This has commonly happened in Pennsylvania. Other defendants in whose cases juries found the very same array of aggravating and mitigating circumstances found by Mr. Blystone's jury have received a life sentence in disregard of the law and of the Court's instructions. Why other defendants did and Mr. Blystone did not is neither knowable nor controllable under Pennsylvania's procedure. In this regard as well, Mr. Blystone was deprived of the reliable capital sentencing determination to which he is constitutionally entitled.

B. The Mandatory Feature Of Mr. Blystone's Jury Instructions Precluded The Jury From Evaluating The Weight Of The Particular Aggravating Circumstance Found In His Case

Pennsylvania has sought to eliminate the sentencer's discretion to evaluate the weight of aggravation in a given case independently of mitigation. Unless the jury finds some mitigating circumstance established by a preponderance of the evidence, the finding of a single aggravating circumstance mandates the death penalty, without consideration of the degree of aggravation presented by the facts. In Mr. Blystone's case, the killing concededly occurred during the commission of a felony. Once the jury found that no mitigating circumstances had been proved, death became automatic. Such a sentencing scheme violates the right to an individualized sentencing determina-

tion every bit as much as a scheme which precludes the consideration of mitigating circumstances.

It is true that the Court has not often been called upon to emphasize the necessity for the exercise of judgment by a capital sentencer in evaluating aggravation on the facts of a particular case. The Court's discussion of aggravating circumstances has come primarily in the context of contentions that a State's definition or application of its statutory aggravating circumstances failed sufficiently to narrow the class of defendants eligible for the death penalty. *See, e.g., Lowenfield v. Phelps, supra; Maynard v. Cartwright, supra.* Without question, a state legislature is to be given wide latitude at the stage of legislative definition (*see Zant v. Stephens, supra*, 462, U.S. at 878 & n. 17) in deciding which defendants can be made eligible for the death penalty.

It does not follow that legislators are constitutionally permitted to decree that, in the absence of mitigation, death is *always* the appropriate penalty for a crime which falls within that class or broadly defined category of aggravation. To the contrary, the Eighth Amendment's basic command of individualized capital sentencing prohibits the legislature from making that kind of categorical decree, for "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty," the capital defendant's right to an individualized sentencing decision requires that "the jury [be] free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. at 1008.

Thus, a jury may decide in a particular case that even though a statutory aggravating circumstance exists, it is "insufficiently weighty to support the ultimate sentence."

Barclay v. Florida, 463 U.S. 939, 964 (1983) (Stevens, J., joined by Powell, J., concurring in the judgment). The plurality in *Barclay* similarly acknowledged that the sentencer will normally decide whether a statutory aggravating circumstance, even though present, "warrants imposition of the death penalty." *Id.* at 949-50.

Moreover, in *Sumner v. Shuman*, the Court recognized explicitly that the Eighth Amendment requires that the sentencer be allowed to evaluate the weight of aggravating circumstances, not only in relation to mitigating circumstances, but also in their own right, to determine how heavily they weigh in favor of a death sentence. 97 L.Ed.2d at 69. As the Court explained,

Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, *but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense.*

Ibid. (emphasis supplied). One of the constitutional problems with a statute which mandates death whenever this particular aggravating factor is established is that "all [prior] offenses are given the same weight" *Ibid.* The identical problem is present in Mr. Blystone's case, where the only aggravating circumstance established—like the prior convictions discussed in *Shuman*—gives rise to varying possible inferences concerning his character and moral culpability.

The breadth of the aggravating circumstance in Mr. Blystone's case, that "[t]he defendant committed a killing while in the perpetration of a felony," demonstrates the importance of sentencer discretion in weighing aggravation. "The diversity of circumstances presented in cases

falling within the single category of killings during the commission of a specified felony . . .," *Roberts v. Louisiana, supra*, 428 U.S. at 333, makes it impossible to say categorically that all such cases warrant death absent mitigation. In Pennsylvania, this aggravating circumstance can be established by the commission of a non-violent felony, *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833 (1985) (plurality opinion); clearly, the death penalty might well be deemed not appropriate in such a case. Even given the more typical fact pattern of a killing during a violent felony such as robbery, as in Blystone's case, there are still a myriad of fact patterns—and associated levels of moral culpability—that such killings may involve. Indeed, in the absence of some additional aggravating circumstance, like the probability of the defendant's future dangerousness, the commission of a murder during a robbery may simply not be seen as one in which the death sentence is warranted.⁵

⁵ In at least one State, Florida, the supreme court has determined that no death sentence can be imposed if the only aggravating circumstance is the "felony murder" circumstance. See, e.g., *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977) (murder in the course of robbery); *Proffitt v. State*, 510 So.2d 896 (Fla. 1988) (murder in the course of burglary).

In other States including Pennsylvania, prosecutors frequently do not seek the death penalty when felony murder is the only statutory aggravating circumstance present. Without consideration, or even investigation, of possible mitigating circumstances, a prosecutor will typically make the judgment, for example, that a shooting during a holdup is not one of those extreme cases which warrants death. Under *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), prosecutors can make this judgment without offending the Constitution. If a prosecutor may make the judgment that a particular killing, although attended by a statutory aggravating circumstance, is not aggravated enough to warrant death, then surely the jury, constitutionally obligated to provide individualized sentencing, must be allowed the same opportunity.

Even the Pennsylvania Supreme Court accepts the proposition that some killings during felonies might properly be thought by a jury not to deserve the death penalty. The plurality in *Holcomb, supra*, sought to find discretion in the jury to make such a judgment as a mitigating circumstance. 508 Pa. at ___, 498 A. 2d at 854. But this attempt at a saving interpretation of the Pennsylvania statute fails for several reasons in Mr. Blystone's case.

First, the *Holcomb* interpretation, announced in 1985, was unsurprisingly not reflected in any way in the jury instructions given at Mr. Blystone's 1984 penalty trial. Under the instructions that were given in Mr. Blystone's case, no reasonable juror could conceivably have imagined that the failure of the felony-murder aggravating circumstance to be aggravated enough to warrant death could be considered as a "mitigating circumstance" established by a preponderance of the evidence. Cf. *Mills v. Maryland supra*; *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Andres v. United States*, 333 U.S. 340, 352 (1948). Neither the jury instructions nor the statutory language on which they were based can fairly support such a strained construction. The jury was unequivocally told that if it found the felony-murder aggravating circumstance established beyond a reasonable doubt and did not find any mitigating circumstance established by a preponderance of the evidence, its verdict *must* be death. It is hard to envision an English-speaking juror concluding from this language that the very same circumstance, felony murder, which was explicitly defined as "an aggravating circumstance" (R. 148) and as the "one . . . aggravating circumstance that you could find" (*ibid.*), would simultaneously demand a verdict of death and constitute a mitigating circumstance allowing life.

The second flaw in the idea that a relative weakness of aggravation could be understood as a mitigating circum-

stance is that this idea twists the very concept of mitigation into unrecognizability. Common parlance and legal tradition alike identify mitigating circumstances with "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. at 304. That is, mitigation represents either some sort of extenuation or excuse for the commission of the crime or something positive about the defendant's character. The fact that crime, though evil, is not sufficiently evil to call for death, is not in any non-artificial sense mitigating. Such a fact might certainly lead the jury not to impose the death penalty—if the jury is instructed that it can consider the fact for that purpose—but not because the fact *reduces* the culpability inherent in the crime. Rather, the jury would simply be saying that the amount of culpability in the case before it is not great enough to deserve death.

To put the matter another way, the mere fact that the crime was not worse is not mitigation. Such a judgment by the jury represents an individualized evaluation of the weight of aggravation, not a finding of mitigation. As such it is within the role assigned to a capital jury by this Court's Eighth Amendment cases, but it was expressly forbidden by the sentencing instructions given under the Pennsylvania statute at Mr. Blystone's trial.

The distinction between the inadequacy of aggravation in a given case and the presence of mitigation was precisely captured by Justice Stevens through his reference in *Barclay* to aggravation being "insufficiently weighty," 463 U.S. at 964, to justify death. A judgment of this kind is not an arbitrary exercise of unbridled discretion but a rational response to the evidence. It is made by prosecutors all the time. *See* note 3, *supra*. Any truly individualized capital sentencing decision must be informed by

the common sense notion that the death penalty should be reserved for the worst cases. *See Gregg v. Georgia, supra*, 428 U.S. at 184 (plurality opinion). No doubt the difference between cases that receive the death penalty and those that do not will often be described by the presence or absence of mitigating circumstances. But not always. In some cases, full consideration of the circumstance of the offense will include the jury's judgment that, based on all the facts, a particular case simply does not warrant death.

For these reasons, the command of the Eighth Amendment is consistent with the view of capital sentencing discretion which has long informed this Court's decisions. As this Court construed the discretion vested in the capital sentencer by Congress in 1897,

The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of [the] opinion that it would not be just or wise to impose capital punishment.

Winston v. United States, 172 U.S. 303, 313 (1899).

Mr. Blystone's jury requested reinstruction of the meaning of mitigation. This suggests that one or more jurors had some hesitancy about taking his life. Given the relative weakness of mitigation in the case, this hesitancy may well have reflected a feeling by one or more jurors that his crime did not warrant death.⁶ Thus it is distinctly

⁶ In this regard, it should be noted that notwithstanding the cold and calculated quality of Mr. Blystone's homicide, juries confronting facts far more egregious have refused to impose death. *See* cases collected in Appendix B, attached hereto.

possible that Mr. Blystone was condemned because his jury was forbidden to make an individualized assessment of the weight of aggravation.

C. The Mandatory Feature Of The Sentencing Instructions Unconstitutionally Limited The Jury's Consideration Of Unenumerated Mitigation

The Pennsylvania death penalty statute provides a list of seven enumerated mitigating circumstances and one "catch-all" circumstance that allows for consideration of unenumerated mitigation. 42 Pa. C.S. § 9711 (e). The statute requires that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence." Section 9711 (c) (iii). The jury is to be instructed that, if one aggravating circumstance is proved and no mitigating circumstance is proved, "the verdict must be a sentence of death." Section 9711 (c)(iv). Mr. Blystone's jury was instructed according to the statute in all of these regards, *see* pages 4-8, *supra*, and its death verdict was explicitly predicated on a finding of one aggravating and no mitigating circumstances, R. 155-56.

Such a verdict cannot withstand constitutional scrutiny if the effect of the sentencing instructions was to foreclose the jury's consideration of any mitigating circumstances. This Court has held that a capital sentencer's consideration of potential mitigation must be uninhibited. *See Hitchcock v. Dugger, supra*, 95 L. Ed.2d at 353 (death penalty reversed because the "jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances . . ."); *McCleskey v. Kemp*, 95 L. Ed.2d 262, 293 n.37 (1987) ("[w]e have held that the Constitution requires that juries be allowed to consider 'any relevant mitigating factor,' even if it is not included in a statutory list," citing *Eddings v. Oklahoma*, 455 U.S. at 112).

The instructions in Mr. Blystone's case impeded the consideration of certain types of unenumerated mitigation. For example, Mr. Blystone's jury was instructed that it could find as a mitigating circumstance that "the defendant was under the influence of extreme mental or emotional disturbance." R. 149. This instruction, based on 42 Pa. C.S. § 9711 (e)(2), did not permit any mitigating weight to be given to a finding that the defendant was mentally disturbed unless the disturbance was "extreme." Mr. Blystone's jury was also instructed (under 42 Pa. C.S. § 9711 (e)(5)) that it could find as a mitigating circumstance that "the defendant acted under extreme duress or acted under the substantial domination of another person." R. 149. Lesser degrees of influence exerted by accomplices could not be considered consistently with this instruction, even though jurors who were left free to consider them might have deemed them mitigating. And under the instructions, of course, if the preclusion of consideration of these various kinds of mitigation resulted in the jury's finding "no mitigating circumstances," then its verdict "must be a sentence of death." R. 148; *see also* R. 150.

Instructions to consider the eighth, "catch-all" mitigating circumstance, set forth in § 9711 (e)(8), did not alleviate the restrictions imposed on mitigation by the earlier instructions. In the first place, subsection (e)(8) is limited by its terms to "[a]ny other evidence of mitigation" (emphasis supplied). Thus, subsection (e)(8) would not appear to permit consideration of kinds of mitigation that fall within the ambit of one of the seven specifically enumerated mitigating circumstances but are excluded from consideration under them by their explicit limitations—e.g., subsection (e)(5) which restricts mitigation to a showing that the defendant acted under *extreme* duress.

Notably, when the Pennsylvania Supreme Court held that "middle-age" could not be proved under 42 Pa. C. S. § 9711 (e)(4) ("[t]he age of the defendant at the time of the crime"), the court did not then say that such evidence could be offered under subsection (e)(8), but held that such evidence "can in no way be offered as a factor in mitigation." *Commonwealth v. Frey*, 504 Pa. 428, —, 475 A.2d 700, 706 (1984), *cert. denied*, 469 U.S. 963 (1984).

More important, the instructions given to Mr. Blystone's jury could never be understood to permit the consideration of statutorily insufficient quantities of enumerated mitigation as *unenumerated* mitigation. The trial judge recited to the jury all seven of Pennsylvania's enumerated mitigating circumstances, replete with qualifiers of degree—"no *significant* history of prior criminal convictions"; "*extreme* mental or emotional disturbance"; "*substantially* impaired" capacity; "*extreme* duress"; "*substantial* domination"; "*relatively minor* participation"; and so forth, *see* R. 149, 153 and then told the jury four times that the "catch-all" mitigating circumstance of subsection (e)(8) was a finding of "any *other* mitigating matter concerning the character or record of the defendant, or the circumstances of his offense," *see* R. 149, 153, 153-54, 154 (emphasis supplied). In this context, "other" could only mean to a reasonable juror, "mitigating matter of a different kind than that provided by the enumerated mitigating circumstances." Otherwise, such a juror would wonder, "why on earth are we being asked to make all of these refined judgments of degree, if lesser amounts of mitigation than are needed to constitute enumerated mitigation can be considered anyway, as unenumerated mitigation?" *See Mills v. Maryland*, *supra*, 100 L. Ed.2d at 394-95 (test for evaluating jury instructions in a capital case is what a reasonable juror could have understood).

Moreover, the jury in Mr. Blystone's case returned from its deliberations and asked for further instruction concerning mitigation. After the judge read the eight mitigating circumstances anew, a juror asked specifically about the meaning of "any other mitigating circumstances." The judge did not suggest that degrees of mitigation which were insufficient under the express terms of the first seven mitigating circumstances could nevertheless be considered under the eighth. Rather, the judge once again characterized the eighth mitigating circumstance as "any *other* mitigating matter . . .," R. 153, 154.

Despite Mr. Blystone's failure to present any evidence, there was mitigation in the record that could have been excluded from consideration by these statutory sentencing instructions and reinstructions. Jackie Guthrie, a Commonwealth witness and co-defendant, testified that Mr. Blystone "bought a fifth of whiskey" on the night of the killing, and her testimony suggested that he had been drinking. R. 24-B. Evidence of voluntary intoxication is presumably admissible to prove enumerated mitigating circumstances (e)(2) and (e)(3). *See Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986) (evidence of drug use admissible to prove (e)(2) and (e)(3)). But both of these mitigating circumstances contain—and were described to the jury as containing—limitations of degree. Subsection (e)(2) requires "extreme mental or emotional disturbance" and subsection (e)(3) requires that "the capacity of the defendant to . . . conform his conduct to the requirements of law was substantially impaired." Having failed to find either (e)(2) or (e)(3), a juror obedient to the court's instructions would have believed that Mr. Blystone's consumption of alcohol could not be considered at all. And if it could not be considered, the resulting absence of mitigation would require a mandatory death sentence.

A similar impediment was presented with regard to the evidence of Mr. Blystone's commitment to the killing. His cold-blooded description of the night's events to a police informer was doubtless a major factor in the jury's sentence of death. Nevertheless, the bravado manifest in this recorded statement is curiously combined with a marked ambivalence about the killing. Even after telling his confederates that he intended to shoot Mr. Smithburger because he thought that Mr. Smithburger could identify them, Mr. Blystone asked Mr. Smithburger privately what Mr. Smithburger remembered about the car. This followed Mr. Blystone's trip to request and obtain his confederates' assent to the killing. While the killing was obviously fully premeditated, Mr. Blystone appears to have been looking for a *locus poenitentiae* at some level, and the jury could easily have concluded that without the group's support he would not have pulled the trigger. Such a conclusion could constitute relevant mitigation. But it would fall short of the showing specified in the enumerated mitigating circumstance which recognizes that the influence of others may mitigate a murder: that "[t]he defendant . . . acted under the substantial domination of another person," 42 Pa. C.S. § 9711 (e)(5), as charged to Mr. Blystone's jury at J.A. 149, 153. And having found this kind of mitigation shut out the door by the court's instructions based on subsection (e)(5), no reasonable juror would likely have supposed that it could re-enter through the window of "any other mitigating matter" under subsection (e)(8).

Concededly, neither of the items of mitigation that we have just discussed, standing alone, was very strong. But that is precisely the situation in which the mandatory feature of Pennsylvania's capital sentencing procedure does the most harm. Under the procedures of other

States, small items of mitigation that are inconclusive in themselves can be cumulated together and weighed against aggravation. Juries confronted with mitigating circumstances that are not very strong can consider that the aggravating circumstances of the case are also not very strong, when this is so. Pennsylvania's procedure, as it was applied through the sentencing instructions in Mr. Blystone's case, *both* precluded *any* consideration of mitigating circumstances subsumed within an enumerated category that failed to meet its quantitative specifications *and* precluded any evaluation of the weight of aggravation unless a mitigating circumstance was found.

Similarly, under a non-mandatory procedure, in which the jury is permitted to return a life verdict after considering "a myriad of factors," *California v. Ramos, supra*, 463 U.S. at 1008, it would not necessarily be reversible constitutional error to withhold the "enumerated mitigating circumstances" label from particular items of evidence that the jury could nonetheless take into account. Eighth Amendment rules are not concerned with the labels used in a capital sentencing process unless they affect the substance of the process. *Zant v. Stephens, supra*; *Barclay v. Florida, supra*. So long as a sentencing jury is clearly given to understand that it can consider all of the impressions which it draws from the evidence—those that rationally favor life as well as those that rationally favor death—and can evaluate them all in making its decision, the constitutional command of individualized capital sentencing has been met. But that was not the understanding conveyed by the jury instructions in Mr. Blystone's case, and his death sentence must accordingly be reversed.

D. The Mandatory Feature Of The Instructions Interjected Unreliability Into Mr. Blystone's Sentencing Proceeding

As noted in Part A of this brief, one of the fundamental principles of the Court's Eighth Amendment jurispru-

dence is that procedures providing for imposition of the death penalty must satisfy "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. at 305). While the principle of heightened reliability has been applied to a variety of state capital procedures, *see, e.g., Turner v. Murray*, 476 U.S. 28, (1986); *Beck v. Alabama*, *supra*; *Johnson v. Mississippi*, *supra*, its most consistent application has been to assure that the capital sentencer is not legally precluded from considering "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, *supra*, 438 U.S. at 604.

Capital sentencing reliability is jeopardized in two ways when a state forbids the lawful consideration of relevant evidence. First, there is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. Second, juries forbidden to give lawful consideration to powerful sentencing factors will consider them unlawfully, with results that are unreliable precisely because they are legally ungoverned. *Woodson v. North Carolina*, *supra*, 428 U.S. at 302-303.

We have demonstrated in Parts B and C above that the instructions to Mr. Blystone's jury created "the risk that the death penalty [would] be imposed in spite of factors which . . . call[ed] for a less severe penalty." These same instructions, required by the Pennsylvania statute, have also produced the pattern of lawless jury sentences foretold by *Woodson*.

In Mr. Blystone's case, the Pennsylvania Supreme Court found that his death sentence was "not out of pro-

portion to that imposed on similarly situated defendants." *Commonwealth v. Blystone*, ___ Pa. ___, ___, 549 A.2d 81, 93 (1988); J.A. 94. This conclusion was buttressed by reference to "the continuing study of capital cases maintained by the Administrative Office of Pennsylvania Courts," which "indicates that in those instances in which sentencing bodies have found one or more aggravating circumstances to exist in the absence of any mitigating circumstances, a sentence of death was returned in the overwhelming majority of those prosecutions." *Id.* at n. 22.

But in fact, the capital defendants who are similarly situated to Mr. Blystone are not those in whose case one or more aggravating circumstances and no mitigating circumstances were found. They are those in whose cases only one aggravating circumstance and no mitigating were circumstances found. And according to the study referenced by the Pennsylvania Supreme Court—the pertinent portion of which is attached as Appendix C, *infra*,—during the 1980's, juries in 38 cases disregarded their oaths and returned verdicts of life imprisonment upon a finding of one aggravating circumstance and no mitigating circumstance, while juries in only 12 such cases—one of which was Mr. Blystone's—honored their oaths and returned verdicts of death.

As the Pennsylvania Supreme Court noted in Mr. Blystone's case, "the statute requires a verdict of death" when one aggravating circumstance and no mitigating circumstances are found. *Id.* at ___, 549 A.2d at 93. The jury is always so instructed. Clearly, under the statute every defendant in such a case "should, of necessity, receive the same sentence"—death. *Commonwealth v. Beasley*, 504 Pa. 485, ___, 475 A.2d 730, 738 (1984). Nevertheless, despite the clear statutory language and

uniform instructions, life sentences are returned far more often than not in cases where, like Mr. Blystone's, one aggravating circumstance and no mitigating circumstances are found.

This is not a pattern produced by isolated, aberrant acts of mercy on the part of maverick juries. It is the product of a procedure so rigid in its unresponsiveness to relevant sentencing considerations that it forces juries routinely to respond outside the law. Whether because the aggravating circumstance that was found was illegally weighed and deemed not to warrant death on the facts of the particular case or because mitigation excluded by the statutory categories was illegally considered, juries told that they could not consider "factors" calling "for a less severe penalty" within Pennsylvania's mandatory capital sentencing rules have proceeded systematically to break the rules.

A sentencing system which thus induces the actual decisionmaking process to operate extralegally in a substantial percentage of cases cannot assure reliability in the determination that death is the appropriate sentence in any specific case. "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts v. Louisiana*, *supra*, 428 U.S. at 335.

No one can say with confidence whether Mr. Blystone's jury found itself conflicted between a judgment that death was not the appropriate punishment for this crime and the mandatory sentencing instructions which forbade it to express that judgment lawfully. We do know that the jury returned from deliberating to request further instruction on the meaning of mitigation. The resulting sentence of death may then reflect, not the jury's "reasoned moral

response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), but simply the rigidity of the instructions it received. Nor can anyone say with confidence why this jury chose to follow those instructions, while so many other juries have disregarded them. The "capriciousness in making . . . jurors' power [to render individualized sentencing judgments] . . . dependent on their willingness to . . . disregard the trial judge's instructions," *Roberts v. Louisiana*, 428 U.S. at 335, is one of the evils which the Court has sought to eliminate since *Furman v. Georgia*, 408 U.S. 238 (1972). When it enters a case, as it has Mr. Blystone's, the Constitution cannot tolerate the resulting sentence of death.

CONCLUSION

For these reasons, the judgment of the Supreme Court of Pennsylvania affirming petitioner's sentence of death should be reversed.

Respectfully submitted,

*PAUL R. GETTLEMAN
R.D. 1, Box 325
Zelienople, PA 16063
(412) 521-0500

BRUCE S. LEDEWITZ
School of Law, Hanley Hall
Duquesne University
900 Locust Street
Pittsburgh, PA 15282
(412) 434-5011

STEFAN PRESSER
125 S. 9th Street, Suite 701
Philadelphia, PA 19107
(215) 592-1513
Attorneys for Petitioner
**Counsel of Record*

APPENDIX

APPENDIX A

PENNSYLVANIA CONSOLIDATED STATUTES

§ 2502. Murder

(a) **Murder of the first degree.**—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) **Murder of the second degree.**—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) **Murder of the third degree.**—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) **Definitions.**—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman." Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." The act of defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime.

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or live imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the courts deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty plea.—If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury.—

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and killed for the purpose of preventing his testimony against the defendant.

in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felon convictions involving the use of threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), committed either before or at the time of the offense at issue.

(e) **Mitigating circumstances.**—Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 19 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) **Sentencing verdict by the jury.**—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(f) **Sentencing verdict by the jury.**—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) **Recording sentencing verdict.**—Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) **Review of death sentence.**—

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(39) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(i) **Record of death sentence to Governor.**—Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of the sentence and review by the Supreme Court.

APPENDIX B

Examples Of Highly Aggravated Cases In Which A Life Sentence Has Been Imposed Or Recommended By A Jury

Alabama

Duncan v. State, 436 So.2d 883 (Ala. Cr. App. 1983) (burglary at night in which mother and four year old son were killed, eight year old son wounded)

Arizona

State v. Schrock, 719 P.2d 1049 (Ariz. 1986) (robbery of elderly woman who died as a result of beating)

State v. Crilz, 666 P.2d 1059 (Ariz. 1983) (after argument defendant shoots and killed first victim at close range, then followed second individual to her home where he shot her to prevent call to the police)

State v. Morales, 630 P.2d 1015 (Ariz. 1981) (victim sodomized, handle of a hoe thrust up rectum, stabbed 19 times)

Arkansas

Hogan v. State, 663 S.W.2d 726 (Ark. 1984) (victim raped, kidnapped and murdered)

California

People v. (Leonard) Brown (1985) 169 Cal.App.3d 728 (two murders; defendant raped second victim's girlfriend next to the corpse)

People v. Talmantez (1985) 169 Cal.App.3d 443 (torture murder and racially-motivated murder special circumstances; defendant and accomplice announced intention to go "nigger huntin" and beat a young Black man to death; Court of Appeal described the occurrence as a "whole series of brutal and cruel acts, [a] continuum of sadistic violence")

People v. Pendleton (1985) 167 Cal.App.3d 413 (defendant shot and killed bar patron who refused order to stand still; defendant shot and blinded deputy sheriff)

People v. (Kenneth) Moore (1985) 162 Cal.App.3d 709 (two murders, 23 counts of robbery, 6 counts of burglary, 5 counts of rape, 3 counts of sodomy, 1 count of oral copulation and other crimes)

People v. Nobel (1982) Cal.App.3d 1014 (killing of deputy sheriff; the deputies "were ambushed and could not even defend themselves;" defendant "fired shot after shot with the intention of killing both [victim and partner]"

Colorado

People v. Lowe, 660 P.2d 1261 (Col. 1983) (murder of a child upon defendant had forced to perform fellatio)

Delaware

Ross v. State, 482 A.2d 727 (Del. Super. 1984) (contract killing victim stabbed 27 times)

McBridge v. State, 477 A.2d 174 (Del. Super. 1984) (wife of the aforementioned victim who arranged for the killing)

Florida

Spaziano v. State, 433 So.2d 508 (Fla. 1983) (jury recommended life in situation where defendant had mutilated and killed two women, judge overruled)

Bolender v. State, 422 So.2d 833 (Fla. 1982) (multiple murder plus torture, jury recommendation of life rejected by judge)

McCrae v. State, 395 So.2d 1145 (Fla. 1981) (rape torture of 67 year old woman, jury recommendation of life rejected by judge)

Louisiana

State v. Parker, 425 So.2d 683 (La. 1983) (multiple killings)

Missouri

State v. Roberts, 738 S.W.2d 606 (Mo.App. 1987) (victim shot, stuffed into trunk while still alive, shot a second time)

Nevada

Ybarra v. State, 679 P.2d 797 (Nev. 1984) (victim raped, set on fire, jury listed four aggravating and no mitigating circumstances)

New Jersey

State v. Serrone, 468 A.2d 1050 (N.J. 1983) (multiple killing, father and nine year old daughter)

North Carolina

State v. Prevette, 345 S.E.2d 159 (N.C. 1986) rape murder of 61 year old woman)

State v. Strickland, 298 S.E.2d 645 (N.C. 1983) (murder of one victim, rape torture of a second who survived)

Utah

State v. Hansen, 734 P.2d 421 (Utah 1986) (victim murdered when defendant torched home after tying victim up during burglary, crime repeated with second victim surviving)

Washington

State v. Bingham, 719 P.2d 109 (Wash. 1986) (victim raped and murdered)

State v. Kester, 686 P.2d 1081 (Wash. App. 1984) (victim raped and murdered)

APPENDIX C

SPSS.LIS LIFE ONLY, 1 AGGRAVATING AND 0 MITIGATING SPSS/PC +

Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Barron	Kevin		Lehigh	135183	05/03/83	White	Male	1958	Life	09/10/84	—
Boettcher	Barry	Michael	Bradford	831986	10/04/79	White	Male	1946	Life	05/24/83	Dead-Other Cause
Breidenstein	Michael	R	Berks	82127501	07/25/82	White	Male	1960	Life	05/20/85	—
Bricker	Robert		Allegheny	8104223	12/14/78	White	Male	1941	Life	02/02/88	—
Cartegena	Victor		Northampton	2951988	01/10/86	Hispanic	Male	1936	Life	—	—
Egleston	Larry		Allegheny	8006126	06/23/80	Black	Male	1962	Life	—	—
Fadden	Robert	Scott	Susquehanna	2941980	08/19/80	White	Male	1965	Life	02/18/82	—
Ferguson	John		Philadelphia	8103039923	12/31/80	Black	Male	1958	Life	12/07/82	—
Frankenberry	Joseph	P	Fayette	8112158	11/14/80	White	Male	1943	Life	11/15/82	—
Graves	Bernie		Allegheny	7901311	02/16/79	Black	Male	1953	Life	—	—
Harris	Bruce	G	Philadelphia	8210161811	09/19/82	Black	Male	1964	Life	02/05/86	—
Harrison	Robert	L	Philadelphia	8308230911	07/05/79	Black	Male	1967	Life	11/01/84	—
Heron	Betty		Allegheny	8306994	—	White	Female	1940	Life	12/29/83	—
Jackson	Harry		Philadelphia	8211357211	11/20/82	Black	Male	1949	Life	07/14/83	—
Joseph	Eric	C	Philadelphia	8404384211	02/22/84	Black	Male	1964	Life	01/30/85	—
Knabshulse	Harry	William	Fayette	8340	—	White	Male	1945	Life	01/03/84	—
Lines	Lawrence		Bucks	119486	12/14/84	White	Male	1944	Life	—	—
Long	Nathan		Philadelphia	8607062111	05/05/86	Black	Male	1948	Life	10/07/87	—
Lyles	Ryrene	T	Philadelphia	8410333011	02/11/84	Black	Male	1960	Life	—	—
Martinez	Ervin	A	Philadelphia	8406073511	08/25/82	Hispanic	Male	1966	Life	10/09/84	—
Mansey	Jacquell		Philadelphia	8112196711	01/26/80	Black	Female	1932	Life	04/26/83	—
Nelson	William		Bucks	387884	07/14/82	Black	Male	1947	Life	—	—

10a

SPSS.LIS (Continued) LIFE ONLY, 1 AGGRAVATING AND 0 MITIGATING SPSS/PC +

Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Mitchell	Mark	A	Philadelphia	8404050812	02/22/84	Black	Male	1964	Life	01/30/85	—
Mitchum	Richard	R	Philadelphia	8006248311	09/11/80	Black	Male	1941	Life	07/23/82	—
Moore	Eugene		Philadelphia	8309174111	06/20/83	Black	Male	1956	Life	08/14/84	—
Nero	James	H	Philadelphia	8306343011	08/14/82	Black	Male	1953	Life	10/03/87	—
Person	Bruce		Philadelphia	8308255111	05/05/82	Black	Male	1950	Life	08/09/84	—
Prosdocimo	William		Allegheny	8104540	12/14/78	White	Male	1951	Life	11/07/83	—
Reid	Robert	A	McKean	81215	10/28/81	White	Male	1949	Life	04/07/82	—
Robon	Felix		Philadelphia	8409104922	02/01/84	Hispanic	Male	1954	Life	08/06/85	—
Sanford	Ch. Lee		Philadelphia	8412023022	10/25/84	Black	Male	1951	Life	05/12/87	—
Tucker	Michael		Lehigh	531979	12/13/78	White	Male	1954	Life	—	—
Tomasak	Phoebe	Louise	Fayette	16881	11/14/80	White	Female	1933	Life	08/14/82	—
Williams	Clifford	L	Philadelphia	8507384911	12/23/83	Black	Male	1948	Life	08/04/87	—
Young	Willie	Lamar	Philadelphia	8307385111	08/17/81	Black	Male	1959	Life	07/09/86	—
Younkin	Elmer	Wayne	Fayette	1601981	11/14/80	White	Male	1929	Life	11/15/82	—

11a

REPORT.LIS
DEATH ONLY, 1 AGGRAVATING AND 0 MITIGATING
SPSS/PC +

12a

Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Beasley	Leslie	Charles	Philadelphia	8011060911	04/13/80	Black	Male	1961	Death	05/10/82	Death Affirmed
Blystone	Scott	Wayne	Payette	21984	09/10/83	White	Male	1966	Death	04/17/86	Death Affirmed
Cooper	Carl	M	Philadelphia	8310008911	01/07/83	Black	Male	1949	Death	05/15/85	Life
Frederick	Edward	Lee	McKean	1631982	06/18/82	White	Male	1947	Death	11/10/83	Life
Lambert	Eugene		Philadelphia	8113084211	12/06/81	Black	Male	1945	Death	10/02/86	Life
Lark	Robert		Philadelphia	8001201211	01/09/80	Black	Male	1953	Death	06/23/86	Death Affirmed
Lewis	Reginald	S	Philadelphia	8202020511	11/21/82	Black	Male	1954	Death	06/25/84	—
Morris	Kelvin		Philadelphia	8207040911	06/09/80	Black	Male	1956	Death	09/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Taylor	Joseph	James	Philadelphia	8502020211	01/19/85	Black	Male	1965	Death	12/03/86	Life

Number of Cases = 12

Supreme Court of the United States

October Term, 1989

SCOTT WAYNE ELYSTONE,

Petitioner,

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Pennsylvania

BRIEF FOR RESPONDENT

ROBERT D. PALATE, JR.^{*}
Attorney General of Pennsylvania

RONALD BROWNE
Special Deputy Attorney General;
Chief, Appeals Unit, Philadelphia
District Attorney's Office

MURRAY J. BROWN, JR.
Special Deputy Attorney General;
Assistant District Attorney,
Philadelphia County

BRYAN D. NEWCOMB
Special Deputy Attorney General;
Assistant District Attorney,
Perry County

GAILA McLENNAN BARNWOLD
Special Deputy Attorney General;
Deputy District Attorney,
Philadelphia County

ROBERT A. GRACE
Chief Deputy Attorney General;
Appeals and Legal
Services Section

Office of the Attorney
General of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

^{*}Member of Bar of

BEST AVAILABLE COPY

QUESTION PRESENTED

Is Pennsylvania's capital sentencing scheme - which explicitly permits the jury to return a verdict of life imprisonment based on any evidence of the defendant's character or record or the circumstances of the offense - unconstitutionally "mandatory" because the jury's conclusion that no mitigating circumstances exist results in a sentence of death?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	11
Argument	
The Pennsylvania capital sentencing procedure assures individualized sentencing through full consideration of relevant mitigating evidence, consistent with this Court's precedent and the Eighth Amendment.	14
A. The Pennsylvania sentencing procedure does not impose a mandatory death sentence.	14
B. The Pennsylvania statute permits full consideration of factors affecting the "weight" of the aggravating circumstances.	21
C. The Pennsylvania statute permits full consideration of facts affecting both enumerated and unenumerated mitigating circumstances.	29
D. Statistics on Pennsylvania death penalty cases, which petitioner has grossly misrepresented, show no pattern of jury nullification to avoid the "mandatory" feature of the Pennsylvania statute.	36
Conclusion	44
Appendix: Pennsylvania Capital Sentencing Statute, 42 Pa. Cons. Stat. Ann. § 9711.	App. 1

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985), <i>reh'g en banc, rev'd on other grounds</i> , 789 F.2d 722 (9th Cir. 1986), <i>rev'd</i> , 483 U.S. 1 (1987).	17
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (<i>en banc</i>), <i>petition for cert. filed</i> , 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553).	17
Baldwin v. Alabama, 472 U.S. 372 (1985).	16
Barclay v. Florida, 463 U.S. 939 (1983).	26
California v. Brown, 479 U.S. 538 (1987).	32, 35
Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), <i>cert. denied</i> , 109 S. Ct. 380 (1988).	18
Enmund v. Florida, 458 U.S. 782 (1982).	22
Franklin v. Lynaugh, 108 S. Ct. 2320 (1988).	29, 35
Furman v. Georgia, 408 U.S. 238 (1972).	15
Godfrey v. Georgia, 446 U.S. 420 (1980).	31
Gregg v. Georgia, 428 U.S. 153 (1976).	15, 28, 43
Hitchcock v. Dugger, 481 U.S. 393 (1987).	17
Jurek v. Texas, 428 U.S. 262 (1976).	16, 28
Lockett v. Ohio, 438 U.S. 586 (1978).	15, 23
Lowenfield v. Phelps, 484 U.S. 231 (1988).	22, 27
Maynard v. Cartwright, 108 S. Ct. 1853 (1988).	31
Penry v. Lynaugh, 57 U.S.L.W. 4958 (1989).	34, 36
Pulley v. Harris, 465 U.S. 37 (1984).	27
Proffitt v. Florida, 428 U.S. 242 (1976).	16

TABLE OF AUTHORITIES - Continued

Page

Roberts v. Louisiana, 428 U.S. 325 (1976).....	16
Spaziano v. Florida, 468 U.S. 447 (1984).....	27, 42
Sumner v. Shuman, 483 U.S. 66 (1987)	16, 26
Wainwright v. Witt, 469 U.S. 412 (1985)	24
Woodson v. North Carolina, 428 U.S. 280 (1976)	15, 16, 43

FEDERAL CONSTITUTION

U.S. Const., amendment VIII.....	<i>passim</i>
----------------------------------	---------------

STATE CASES

Commonwealth v. Cross, 508 Pa. 322, 496 A.2d 1144 (1985).....	20
Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986), <i>cert. denied</i> , 483 U.S. 1010 (1987).....	19
Commonwealth v. Graves, 310 Pa. Super. 184, 456 A.2d 561 (1983)	39
Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985), <i>cert. denied</i> , 475 U.S. 1150 (1986).....	22
Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309, <i>cert. denied</i> , 469 U.S. 971 (1984)	36
Commonwealth v. Myers, 481 Pa. 217, 392 A.2d 685 (1978).....	7
Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), <i>cert. denied</i> , 479 U.S. 1070 (1987) 10, 18, 19	
Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), <i>cert. denied</i> , 461 U.S. 970 (1983)	19

TABLE OF AUTHORITIES - Continued

Page

Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), <i>cert. denied</i> , 478 U.S. 1010 (1986)	18
Hogan v. State, 281 Ark. 250, 663 S.W.2d 726 (1984)	43
Houston v. State, 593 S.W.2d 267 (Tenn. 1979), <i>cert.</i> <i>denied</i> , 449 U.S. 891 (1980)	18
Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984), <i>cert. denied</i> , 474 U.S. 865 (1985).....	18
McCrae v. State, 395 So. 2d 1145 (Fla. 1980), <i>cert.</i> <i>denied</i> , 454 U.S. 1041 (1981)	42
People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984), <i>cert. denied</i> , 471 U.S. 1044 (1985).....	17
People v. Brown, 169 Cal. App. 3d 728, 215 Cal. Rptr. 465 (1985), <i>cert. denied</i> , 108 S. Ct. 717 (1988)	42
People v. Jones, 94 Ill. 2d 275, 447 N.E.2d 161 (1982), <i>cert. denied</i> , 464 U.S. 920 (1983)	17
People v. McClain, 46 Cal. 3d 97, 757 P.2d 569, 249 Cal. Rptr. 630 (1988), <i>cert. denied</i> , 109 S. Ct. 1356 (1989)	17
Spaziano v. State, 433 So. 2d 508 (Fla. 1983), <i>aff'd</i> , Spaziano v. Florida, 468 U.S. 447 (1984).....	42
State v. Bell, 745 S.W.2d 858 (Tenn. 1988)	18
State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979), <i>cert. denied</i> , 446 U.S. 970 (1980)	18
State v. Gillies, 142 Ariz. 564, 691 P.2d 655 (1984), <i>cert. denied</i> , 470 U.S. 1059 (1985)	17
State v. Grilz, 136 Ariz. 450, 666 P.2d 1059 (1983)	42

TABLE OF AUTHORITIES - Continued

Page

State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), <i>cert. denied</i> , 472 U.S. 1032 (1985).....	18
State v. Jordan, 137 Ariz. 504, 672 P.2d 169 (1983)	17
State v. Kester, 38 Wash. App. 590, 686 P.2d 1081 (1984)	43
State v. Price, 195 N.J. Super. 285, 478 A.2d 1249 (1984)	18
State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312 (1984), <i>cert. denied</i> , 471 U.S. 1094 (1985)	17
State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986)	43
State v. Serrone, 95 N.J. 23, 468 A.2d 1050 (1983)	42
Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984), <i>cert. denied</i> , 470 U.S. 1009 (1985)	42

STATE STATUTES

Ariz. Rev. Stat. Ann. § 13-703.....	17
Cal. Penal Code § 190.3	17
Conn. Gen. Stat. § 53A-46A.....	17
Idaho Code § 19-2515.....	17
Ill. Ann. Stat. ch. 38 ¶ 9-1.....	17
Md. Ann. Code art. 27 § 413	18
Mont. Code Ann. §§ 46-18-301 to 310	18
N.J. Stat. Ann. § 2C:11-3.....	18
N.J. Stat. Ann. § 2C:49-1 <i>et seq.</i>	42

TABLE OF AUTHORITIES - Continued

Page

Ohio Rev. Code Ann. § 2929.03(D)(2), (3).....	18
Or. Rev. Stat. § 163.150	18
18 Pa. Cons. Stat. Ann. § 1102.....	18
18 Pa. Cons. Stat. Ann. § 2502.....	18
42 Pa. Cons. Stat. Ann. § 9711(a)	18
42 Pa. Cons. Stat. Ann. § 9711(b)	18
42 Pa. Cons. Stat. Ann. § 9711(c).....	19, 39
42 Pa. Cons. Stat. Ann. § 9711(d)	8, 19, 23
42 Pa. Cons. Stat. Ann. § 9711(e) .	19, 30, 31, 32, 33, 34
42 Pa. Cons. Stat. Ann. § 9711(f).....	19
42 Pa. Cons. Stat. Ann. § 9711(g)	19
42 Pa. Cons. Stat. Ann. § 9711(h)	19
Tenn. Code Ann. § 39-2-203.....	18
Tex. Code Crim. Proc. Ann., art. 37.071	18
Wash. Rev. Code §§ 10.95.060 to 080	18

MISCELLANEOUS

Ledewitz, <i>The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Stat- ute</i> , 21 Duq. L. Rev. 103 (1982)	35
Webster's International Dictionary, Second Edi- tion	26

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder by a Pennsylvania jury for robbing a hitchhiker of \$13 and then shooting the man six times in the back of the head because he believed the victim might be able to identify him. Later petitioner described the murder as "thrilling." The Commonwealth presented one aggravating circumstance under Pennsylvania's capital sentencing statute; petitioner, after a detailed colloquy, declined to present any evidence of mitigation; and the jury returned a verdict of death. Following an unsuccessful direct appeal to the Pennsylvania Supreme Court, this Court granted certiorari.

The crime occurred late on a Friday night, September 9, 1983, in Fayette County, southwestern Pennsylvania. Petitioner was out with his girlfriend, Jackie Guthrie, his friend, George Powell, and Powell's companion, Barbara Clarke (R. 2A, 1B-2B, 101).¹ Petitioner, driving the car in which the four were riding, and armed with a .22 caliber revolver he had stolen from a former place of employment, determined that he needed money and that he

¹ The trial testimony, presented on June 11, 12 and 13, 1984, is contained in a single volume not included in the Joint Appendix, and designated here as "R." The testimony of two trial witnesses, although appearing in the volume at the appropriate chronological point, was typed immediately for use in other proceedings, and is numbered separately from the pagination for the remainder of the volume. Barbara Clarke's testimony is numbered as 1A-22A and appears between pages 31 and 32 of the regular pagination. Jackie Guthrie's testimony is numbered as 1B-32B and appears between pages 57 and 58 of the regular pagination.

would get it through robbery (R. 34-35, 5B-6B, 15B-18B, 102). Petitioner soon identified a target, twenty-four-year-old Dalton Smithburger. Dalton, a special education student, had been at a tavern, where the bartender had given him some beer and two dollars because he "thought maybe he needed a sandwich or something" (R. 4-5, 27). Dalton then walked to a Pizza Hut, bought a Pepsi, and started hitchhiking home (R. 5-7, 5A-6A, 5B, 102).

Petitioner stopped the car, while George Powell, in the back seat, hid his girlfriend's face under a coat. Dalton asked petitioner to take him home. Once in the front seat, the victim asked if anyone wanted a drink of his beer. Petitioner instead wanted to know how much money Dalton was carrying (J.A. 119; R. 3A, 6A, 3B, 6B, 27B, 102). When the victim replied that he had only a few dollars, petitioner put the gun to his head and repeatedly ordered him to keep his eyes closed or petitioner would blow his brains out. Jackie, petitioner's girlfriend, twice asked petitioner not to do it (J.A. 119-20; R. 6A-8A, 7B-8B, 28B-29B, 102-03). The frightened victim, however, was unable to resist the temptation to look up. Angered by this disobedience, petitioner pulled over and directed Powell to watch the boy while petitioner came around the car. Petitioner then told Powell to accompany him, but Powell stalled (J.A. 120-21; R. 8A-10A, 7B-9B, 103, 117).

By himself, then, petitioner took the victim into a field at gunpoint, searched him, and ordered him to lie face down. Returning to the car, petitioner told his cohorts that he planned to kill the victim because of the possibility of identification. Jackie shrugged her shoulders; Powell said that the victim would not be able to identify his girlfriend and him, and that petitioner could

do whatever he wanted (J.A. 120-22, 136; R. 9A-10A, 8B-10B, 12B, 103-05, 117).

Petitioner went to the victim, sat on his back, and asked him if he could describe petitioner's car. The victim replied: "all I know is it was green and the back end was wrecked." The description was accurate. Petitioner said "goodbye," felt the victim's whole body go rigid in fear, and shot him six times in the back of the head (J.A. 122, 129; R. 10A-11A, 10B, 12B, 104-05, 111).

Jackie started the engine to leave without petitioner. Before she could get away, however, petitioner returned and pushed her out of the driver's seat. Petitioner said "[i]t was thrilling." He then took his friends to a dark stretch of road, where he told them he would kill them all if they revealed what he had done (R. 10B-11B).

Two hours later, the group returned to the murder scene. Petitioner had remembered that he touched the victim's cigarette pack while searching him and feared fingerprints might have been left. This time, after petitioner disparaged him for remaining behind earlier, Powell went with petitioner to the body. Petitioner retrieved the pack from under the corpse, then smoked the bloodied cigarettes (J.A. 123-25; R. 12A-14A, 12B-13B, 105-08).

The body was discovered the next morning (R. 11). Two beer bottles and a cup from Pizza Hut were alongside (R. 16-17). Autopsy revealed six separate gunshot wounds to the back of the head and through the brain (R. 21-23).

A week after the murder, petitioner held a gun to his girlfriend's head, threatened to put her "out there" with Dalton Smithburger, and clicked the trigger six times (R. 31B-32B). He also told her that, if she were questioned about the crime, she must take the blame for him (R. 19B).

Petitioner's threats constrained his associates from reporting the crime to authorities (R. 12A, 11B). Some months later, however, George Powell let slip word of the incident to a mutual friend, Miles Miller (R. 85-86). Miller went to the state police, who placed a small tape recorder on Miller's person before a meeting with petitioner (R. 65-70, 87-90).

During the conversation, on December 15, 1983, petitioner discussed the murder in detail. Petitioner revealed his intent to rob and kill someone. Even before picking out a victim, he had decided, "fuck it - I'm going to just drive up and blow somebody's brains out and take their wallet" (J.A. 119; R. 101). When he came across Dalton Smithburger, "I knew what I was going to do. I told everyone what I was going to do They thought I was bull-shitting" (J.A. 119-20; R. 102).

As the crime progressed, petitioner told Miller, he was pleasantly surprised that the victim made no escape attempt. After ordering Dalton to lie down and returning to the car, "I thought I was going to have to chase him through the field when I went back. I thought for sure this mother-fucker ain't going to lay there, but I wanted to warn them - you know, Jackie and George - I wanted to warn them that I was going to waste him." When he went back to the field and found the victim as he had left him, "I had to laugh" (J.A. 129; R. 111).

Petitioner then described the actual shooting: "I fucking wasted him. Blood spattered all over me You should have heard it, man - pow, pow, pow, pow, pow, pow. Brains started oozing out of this fuck. Every hole I would put in his head, brains would start oozing out each time I shot him" (J.A. 122; R. 105).

At the same time, petitioner demonstrated sophisticated knowledge of crime detection techniques and how he believed he had thwarted them. He told Miller that there would be no fingernail scrapings for police to find, that there were too many footprints at the scene for a match to be made, and that the only object he could have left fingerprints on was the cigarette pack, which he retrieved (J.A. 123; R. 105-06). He discoursed on firearms ballistics, explaining that, although most people didn't know it, bullets could be matched not only to characteristic marks inside the gun barrel, but also to the firing pin and, in the case of automatics, the firing chamber (J.A. 137-39; R. 118-20). (Police eventually located the gun linked to this murder: it was a revolver, not an automatic; the barrel was missing; and the firing pin had been filed down (R. 37-39, 43, 50-51, 14B-18B, 81-82)).

In light of these precautions, petitioner told Miller, "I knew the only way I could get caught is if somebody talked, but nobody's going to talk 'cause I'm going to kill them too." Petitioner was confident of silence for the additional reason that George Powell "is an accessory to murder. He went back there and touched the body with me, and Jackie's an accessory" as well (J.A. 131; R. 112-13). Now, said petitioner, "[w]hen I tell him that I'll kill him, it don't mean I'm going to 'beat you up or hurt you; it means I'm going to kill you,' and Jackie looks at

me different, you know" (J.A. 132; R. 114). "You just did it to prove it to them?" Miller asked. "No," said petitioner, "it was necessary. The guy could identify us, you know." But "[i]t proved a point at the same time" (J.A. 133; R. 115).

To the date of the conversation with Miller, petitioner's efforts at escaping apprehension had succeeded. "[N]othing ever happened," petitioner said. "Nobody ever came to us [I]t's an unsolved murder What I am trying to tell you man, is - it's easy. It's fucking easy, you know." "To kill somebody?" Miller asked. Petitioner replied: "To get away with it" (J.A. 128; R. 110). He later continued: "If you know what you are doing, man, you can get away with anything, including murder. It ain't hard at all" (J.A. 130; R. 112). "You can walk up and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self confidence" (J.A. 133; R. 114).

Petitioner declared his intent to employ the same strategy in future crimes: "That's why I don't want to fuck around anymore. If I think that motherfucker is going to identify me, or his being alive is going to help me get caught or if I ain't going to have time to get away or something, I'm going to kill him The next job I am thinking about doing . . . I am ready to do the job which would help me get my house, my apartment, have enough money for Christmas" (J.A. 137; R. 118).

Christmas was just ten days later. On December 16th, however, petitioner was arrested. Although facing a first degree murder charge and possible death sentence, petitioner, against counsel's advice, declined to engage in

plea negotiations because he believed he could get the taped conversation suppressed, and because a conviction would constitute a violation of petitioner's parole on other offenses and result in a return to prison for those crimes. Accordingly, the case came to trial in June, 1984. Petitioner's suppression motion was denied, but he chose to proceed to trial in order to preserve his appellate claims (R. 4/12/85, 58-59).²

At trial, both Jackie Guthrie, defendant's girlfriend (R. 1B-32B), and Barbara Clarke, Powell's girlfriend (R. 1A-22A), testified in detail to the events of that night. The Commonwealth also presented evidence that petitioner had stolen a .22 caliber revolver two months before the murder, that he sold the weapon the month after the murder, and that the slugs recovered from the victim were consistent with having been fired from a weapon of this type (R. 37-39, 43, 50-51, 14B-18B, 81-83). Finally, the Commonwealth played the tape of petitioner's own recounting of the crime (J.A. 118-39; R. 101-20).³ After a

² See, e.g., *Commonwealth v. Myers*, 481 Pa. 217, 392 A.2d 685 (1978) (under Pennsylvania law, guilty plea waives all appellate issues except jurisdiction of court, legality of sentence, and validity of plea).

The record reference is to an evidentiary hearing held before the trial court on April 12, 1985, concerning petitioner's motion for a new trial.

³ The trial court did not allow the jury to hear the complete tape recording, excerpting portions concerning sexual relationships and petitioner's statements that he had committed as many as seven other murders (R. 97-98). The complete tape was, however, made part of the record.

colloquy with the court, petitioner personally stated that he did not wish to testify or present witnesses (R. 122-24). The jury found him guilty of murder in the first degree, robbery, and conspiracy on June 13, 1984 (R. 138-39).

The case immediately proceeded to a capital sentencing hearing before the same jury. The Commonwealth offered one aggravating circumstance in support of a death penalty, that the murder occurred during the perpetration of a felony. 42 Pa. Cons. Stat. Ann. § 9711(d)(6). The Commonwealth did not offer any new evidence to establish this circumstance, but relied on the trial record (J.A. 9; R. 146).

Petitioner indicated that he did not wish to present evidence of mitigating circumstances. Petitioner's counsel stated his advice, in lengthy discussions with petitioner, that petitioner testify and call his parents as witnesses. The trial court cautioned petitioner that the jury could find the aggravating circumstance presented if it concluded that the homicide occurred during perpetration of the robbery; that petitioner had the right to present "whatever evidence you wish in mitigation of sentence," either as to any of the specific statutory examples of mitigating circumstances or as to any other matter concerning petitioner's character or record or the circumstances of the offense; but that, if the jury chose on the basis of the evidence before it to find the one aggravating circumstance and no mitigating circumstances, it would be required under Pennsylvania law to return a sentence of death. The court urged petitioner to think carefully, warning him that his decision would be absolutely final, and that he would not later be able to challenge his

sentence on the ground that no mitigating evidence had been presented. After consulting again with counsel, petitioner maintained his decision not to present evidence (J.A. 3-8; R. 140-45).

The court then charged the jury in accordance with the Pennsylvania capital sentencing statute and the explanation previously given to petitioner (J.A. 11-16; 147-53). Petitioner's trial counsel perceived no inadequacies in the court's guidance on the sentencing process. After deliberating briefly, the jury returned and asked the court to repeat its instructions on mitigating circumstances. The court did so, going through each of the specific circumstances outlined in the statute, as well as the statutory catchall provision allowing consideration of any other mitigating matter derived from the evidence concerning the petitioner's character or record or the circumstances of this offense. One juror then asked for further comment on this last provision. The court responded that it gave the jury "great latitude" in deciding what it might draw from the record to consider as a mitigating circumstance. The court explained that, if the jury found any mitigating circumstances, it would have to weigh whatever it found mitigating against the aggravating circumstance in order to determine the sentence. Again, petitioner's counsel found the instructions sufficient. The jury indicated it was satisfied with the court's response and returned to deliberate further (J.A. 16-18; R. 153-55). Later that day it reached a verdict of death (J.A. 18-20; R. 155-57).

Petitioner subsequently filed post-verdict motions seeking relief on 41 grounds (J.A. 27-33). Trial counsel, for the first time, raised the claim that the Pennsylvania sentencing statute was facially unconstitutional because

of its allegedly "mandatory" feature. New counsel was appointed during the post-verdict proceedings. Although petitioner raised various claims of ineffective assistance of trial counsel, he acknowledged that the decision not to present any additional evidence at the sentencing hearing had been his alone (R. 4/12/85, 23). The trial court denied post-verdict motions, and formally imposed sentence on April 17, 1986 (J.A. 93).

Pursuant to Pennsylvania's capital sentencing statute, petitioner had an automatic direct appeal to the highest state court, the Pennsylvania Supreme Court. That court heard argument in March, 1987, and reargument in March, 1988, solely on the issue of the suppressibility, under the state constitution, of the tape recording of petitioner's account of the crime. On October 17, 1988, the court affirmed the judgment of sentence (J.A. 149). The court rejected the issue raised here, that Pennsylvania's capital sentencing statute is unconstitutionally mandatory, by relying on *Commonwealth v. Peterkin*, 511 Pa. 299, 327-328, 513 A.2d 373, 387-388 (1986), *cert. denied*, 479 U.S. 1070 (1987) (J.A. 113). There, the court stated:

Although it is true that the Pennsylvania death penalty statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, the statute permits the defendant to introduce a broad range of mitigating evidence that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstances found by the jury. Appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of mitigating circumstances

The Pennsylvania statute clearly permits consideration of such evidence. Specifically, Section 9711(e)(8) permits the introduction of "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). Thus, we find no merit to appellant's constitutional challenges to the Pennsylvania death penalty statute [footnotes omitted].

This Court granted certiorari on March 27, 1989 (J.A. 150). Petitioner retained new counsel, who filed petitioner's brief on the merits, to which the Commonwealth now responds.

SUMMARY OF ARGUMENT

This Court's precedent leaves no room for the assertion that a capital sentencing statute is unconstitutionally "mandatory" merely because a death sentence results when the jury has had full opportunity to consider, but has declined to find, even a single mitigating circumstance. Such a statute appropriately implements the requirement that the law channel the jury's discretion, while guaranteeing individualized sentencing, so that the sentencer may rationally distinguish those it feels deserve the penalty from those it feels do not. In accordance with these principles, the Pennsylvania death penalty procedure does not create a mandatory penalty, but allows any fact the sentencer may deem to be mitigating to circumvent the imposition of a death verdict despite the presence of aggravating circumstances. The jury need not have unbridled discretion at every stage in the sentencing process in order to give effect to mitigation. Nor may

petitioner escape this conclusion by changing the focus of his argument from the facial validity of the allegedly "mandatory" provision (the basis of his certiorari petition) to the operation of other aspects of the sentencing process (the bulk of the discussion in his brief).

There is no constitutional requirement that the sentencer be directed to "weigh" the aggravating circumstances independently and in a vacuum where it has found that no mitigating circumstances exist. The weight to be attached to aggravating circumstances arising from the defendant's record or his offense is simply another way of describing whether any mitigating circumstances exist in the defendant's character and the nature of his crime. Individualized sentencing is thus fully afforded by the consideration of relevant mitigating evidence. Any conclusions arising from the proposed independent weighing of an aggravating circumstance may be expressed as a mitigating circumstance under the Pennsylvania statute. The additional step urged by petitioner is constitutionally superfluous.

The Pennsylvania statutory provision on mitigating circumstances, stating seven examples followed by a general "catchall" definition, and the jury instructions conforming to the statutory language, do not preclude consideration of mitigating facts which fall short of the quantitative standards supposedly set forth in the examples. The jury need satisfy only itself that the evidence qualifies as one of the enumerated examples; no external tests prevent it from considering whether evidence should be deemed a mitigating circumstance. Moreover, the plain wording of the statute's catchall provision, as well as the instruction given the jury here, indicated that

any fact relevant to the circumstances of the crime or the character and history of petitioner could be considered in mitigation. Petitioner's view, that a reasonable juror could misconstrue the statute's examples as somehow negating the catchall definition which followed, is unrealistic and strained. Further, a state is entitled, through such descriptive examples, to suggest to the sentencer the nature and quality of the concept of mitigation. Any narrowing which resulted from this guidance was within the state's power. The capital sentencing process must permit the jury to make a reasoned moral judgment based on the evidence, but it need not invite the jury to act on insubstantial feeling alone.

The statistics in petitioner's Appendix C do not remotely demonstrate jury nullification in cases implicating the Pennsylvania statute's so-called "mandatory" feature. This is because petitioner has enormously misstated the data on Pennsylvania death cases compiled by the Administrative Office of Pennsylvania Courts (AOPC). Petitioner affirms that the cases he lists involved a jury *finding* of one aggravating circumstance and no mitigating circumstances, so that a death sentence should have resulted. In fact, the life sentence entries on petitioner's list represent, for the most part, cases where one aggravating circumstance was *presented* (argued or supported by evidence) at sentencing, but where the jury did not conclude that the circumstance was *proven*, thus requiring a sentence of life. This is confirmed by the official forms submitted by Pennsylvania trial courts in all first degree murder cases, from which the AOPC data are generated. The AOPC maintains these forms on file,

and photocopies of forms for the life sentence cases mentioned in petitioner's appendix are included in a lodging to Section D of this brief. The forms show one aggravating circumstance presented, none found. Since Pennsylvania explicitly requires a life sentence in such cases, it is hardly surprising that the juries returned life sentences. Petitioner's data indicate, if anything, that the Pennsylvania law is functioning properly. The statute, and the verdict in this case, do not offend the Constitution.

ARGUMENT

THE PENNSYLVANIA CAPITAL SENTENCING PROCEDURE ASSURES INDIVIDUALIZED SENTENCING THROUGH FULL CONSIDERATION OF RELEVANT MITIGATING EVIDENCE, CONSISTENT WITH THIS COURT'S PRECEDENT AND THE EIGHTH AMENDMENT.

A. The Pennsylvania sentencing procedure does not impose a mandatory death sentence.

The question on which this Court granted certiorari is whether the Pennsylvania capital punishment statute mandates a sentence of death by operation of law, without allowing for consideration of factors which warrant a reduced punishment. Although petitioner's brief on the merits attempts to shift ground away from this question, it remains the primary issue before the Court, and must be decided in the state's favor. Pennsylvania grants the sentencing jury full authority to find a mitigating circumstance from any evidence concerning the defendant's character or record or the circumstances of his offense, and to fix the sentence at life based on that finding. The

penalty is not "mandatory" merely because the jury may instead choose to find that no mitigating circumstances exist. Yet there must be some point, after full individualized consideration, at which the state may genuinely limit the capital sentencing process, or *Furman's* mandate to reduce the arbitrariness in imposition of the death penalty loses force.

The Pennsylvania statute comports completely with the principles governing capital sentencing procedures which this Court has laid out since *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court held that the unfettered discretion normally exercised in sentencing could not be employed in capital cases, but must instead be replaced by systems narrowing the standards for death eligibility and discouraging arbitrary application of those standards. In *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases, the Court held that constitutional capital sentencing schemes must not only narrow the class, but also provide for full consideration of individual differences within the class. In *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality), and subsequent cases, the Court held that this individualized consideration must consist of examination of the defendant's character and record and the circumstances of the offense.

Throughout this period, the Court has treated as unconstitutionally "mandatory" those statutes which automatically resulted in death upon conviction for a particular offense, without any examination of the individual defendant. In *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality), the statute in question provided an automatic death penalty for a first degree murder conviction. The plurality found this scheme an unacceptable

departure from societal standards because it allowed no individualized consideration of mitigating evidence. *Accord Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality). Similarly, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court invalidated a statute providing for a mandatory death sentence for a killing by a life prisoner because it permitted no consideration of mitigating circumstances.⁴

On the other hand, the Court has never condemned as mandatory a statute which, like Pennsylvania's, requires a death sentence only after the jury has completed its determination of aggravating and mitigating factors. See *Jurek v. Texas*, 428 U.S. 262, 269 (1976) ("yes" answer to each special question results in death sentence; see concurring opinion at 278: death penalty "must" be imposed under certain findings);⁵ *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (White, J., Burger, C.J., and Rehnquist, J., now Chief Justice, concurring) (sentencing judge "required" to impose death where aggravating factors outweigh mitigating factors); see *Baldwin v. Alabama*, 472 U.S. 372 (1985) (allegedly mandatory nature of sentencing statute irrelevant where sentencer actually had full

⁴ The dissenting opinion in *Woodson* observed that, no matter how serious the crime, requiring particularized consideration rules out a "mandatory" death sentence for that crime. 428 U.S. at 321. This view is borne out by the *Sumner* decision. Indeed, if any mitigating factor may result in a sentence of life imprisonment, no statute which gives effect to such factors can be considered to impose a "mandatory" death penalty.

⁵ In *Jurek*, a majority of the Court (Stewart, J., Powell, J., Stevens, J., with Burger, C.J., White, J., and Rehnquist, J., now Chief Justice, concurring) apparently accepted this so-called "mandatory feature" as a valid accommodation to Eighth Amendment concerns in the Texas statute.

discretion to give effect to mitigating circumstances). What is an unacceptable "mandatory" provision under the Eighth Amendment must be measured through the statute's guidance of sentencing discretion and its provision for individualized sentencing consideration through mitigating factors. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (individualized sentencing must be afforded by unrestricted consideration of relevant mitigating evidence). It is a failure to meet these concerns, rather than syntax in the imperative, which renders a statute unconstitutionally mandatory.⁶

⁶ Of thirty-seven states with a death penalty provision, fourteen (including Pennsylvania) require imposition of a verdict of death in the event that aggravating factors (or their equivalent) are unmitigated. Those courts which have reviewed these statutes have, with one exception, held that such a formulation does not render the death verdict mandatory, since any mitigating circumstance may preclude a capital sentence:

ARIZONA, *Ariz. Rev. Stat. Ann.* § 13-703; *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Gillies*, 142 Ariz. 564, 691 P.2d 655 (1984), *cert. denied*, 470 U.S. 1059 (1985); *State v. Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983); see *Adamson v. Ricketts*, 755 F.2d 441 (9th Cir. 1985), *reh'g en banc*, *rev'd on other grounds*, 779 F.2d 722 (9th Cir. 1986), *rev'd*, 483 U.S. 1 (1987); *contra Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), *petition for cert. filed*, 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553); CALIFORNIA, *Cal. Penal Code* § 190.3; *People v. McClain*, 46 Cal. 3d 97, 757 P.2d 569, 249 Cal. Rptr. 630 (1988), *cert. denied*, 109 S. Ct. 1356 (1989); CONNECTICUT, *Conn. Gen. Stat.* § 53A-46A; IDAHO, *Idaho Code* § 19-2515; ILLINOIS, *Ill. Ann. Stat. ch. 38* § 9-1; *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984), *cert. denied*, 471 U.S. 1044 (1985); *People v. Jones*, 94 Ill. 2d 275,

(Continued on following page)

A description of the Pennsylvania statutory scheme substantiates the point. Pennsylvania confines the death penalty to cases of first degree murder, defined as murder "by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. Cons. Stat. Ann. § 2502(a), (d); 18 Pa. Cons. Stat. Ann. § 1102(a). Felony murder is defined as second degree murder and carries a mandatory sentence of life imprisonment. *Id.* § 2502(b); § 1102(b).

Immediately after a first degree murder conviction, a penalty hearing is held before the jury which decided guilt. Sentencing is performed by the jury unless a jury is waived by the defendant, in which case the process is carried out by the trial judge. 42 Pa. Cons. Stat. Ann.

(Continued from previous page)

447 N.E.2d 161 (1982), *cert. denied*, 464 U.S. 920 (1983); MARYLAND, Md. Ann. Code art. 27 § 413; *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), *cert. denied*, 478 U.S. 1010 (1986); MONTANA, Mont. Code Ann. § 46-18-301 to 310; *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979), *cert. denied*, 446 U.S. 970 (1980); NEW JERSEY, N.J. Stat. Ann. § 2C:11-3; *State v. Price*, 195 N.J. Super. 285, 478 A.2d 1249 (1984); OHIO, Ohio Rev. Code Ann. § 2929.03(D)(2), (3); *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), *cert. denied*, 472 U.S. 1032 (1985); OREGON, Or. Rev. Stat. § 163.150; PENNSYLVANIA, 42 Pa. Cons. Stat. Ann. § 9711; *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), *cert. denied*, 479 U.S. 1070 (1987); TENNESSEE, Tenn. Code Ann. § 39-2-203; *State v. Bell*, 745 S.W.2d 858 (Tenn. 1988); *Houston v. State*, 593 S.W.2d 267 (Tenn. 1979), *cert. denied*, 449 U.S. 891 (1980); TEXAS, Tex. Code Crim. Proc., art. 37.071; *Johnson v. State*, 691 S.W.2d 619 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985); WASHINGTON, Wash. Rev. Code §§ 10.95.060 to 080; *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 380 (1988).

§ 9711(a), (b), App. 1. The jury's decision is not merely a recommendation, but actually fixes the sentence. § 9711(f), (g), App. 5.

The class of death-eligible murderers is further narrowed by an exclusive list of specific aggravating circumstances which must be proven beyond a reasonable doubt at the penalty hearing. All relevant mitigating evidence is considered in determining whether any mitigating circumstances exist by a preponderance of the evidence. Seven non-exclusive statutory examples of mitigating factors are given, followed by a "catchall" general provision. § 9711(d), (e), App. 2-4.

If the sentencer unanimously finds one or more aggravating circumstances and no mitigating circumstances, or one or more aggravating circumstances which outweigh any mitigating circumstances, the sentence "must" be death. In all other cases, the sentence "must" be imprisonment for life. § 9711(c), App. 2. A death sentence is automatically appealed to the Supreme Court of Pennsylvania, which reviews claims of error, conducts a proportionality review, and independently determines whether the penalty was the product of "passion, prejudice or any other arbitrary factor." § 9711(h), App. 5-6; *Commonwealth v. Zettlemyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970 (1983).

This procedural structure does not improperly mandate a death penalty. Although guidance is provided throughout the sentencing procedure, the end result is that the jury may always choose life over death by deciding that one or more mitigating circumstances exist, and that any aggravating circumstances do not outweigh the mitigating circumstances. *Commonwealth v. Peterkin*; *Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986), *cert.*

denied, 483 U.S. 1010 (1987); *Commonwealth v. Cross*, 508 Pa. 322, 496 A.2d 1144 (1985) (plurality). By using the word "must" in the last stage of the interlocked process, Pennsylvania encourages the jury to determine any mitigating circumstances, and weigh them against any aggravating circumstances, most carefully. If the state may not constitutionally undertake even this minimal level of oversight, as petitioner maintains, if it must allow complete discretion even after aggravation has been found and mitigation rejected, then the concern which caused the massive revision of death penalty laws almost two decades ago – the elimination of arbitrariness – has been turned on its head. The Eighth Amendment should not be interpreted to require gut level sentencing. The Pennsylvania system well balances the competing concerns of fair capital procedures.⁷

⁷ Apparently recognizing that the question presented in his certiorari petition provides little hope for success, petitioner shifts focus in his brief on the merits. He now urges that his sentencing process was unconstitutional not because of its "mandatory feature" in itself, but because it failed to provide explicitly for consideration of (1) evidence which purportedly affects the "weight" of aggravating circumstances, but yet does not qualify as a mitigating circumstance, and (2) evidence which is too weak in "degree" to meet quantitative restrictions purportedly contained in the statute's specified mitigating circumstances, but which still justifies a life verdict. These contentions are addressed in detail in Sections B and C below. Two general points must be made here.

First, although petitioner calls his argument an "as applied" challenge to his sentence, it is in large part a facial attack on the constitutionality of the Pennsylvania statute. All rulings and instructions to the sentencing jury here were in

(Continued on following page)

B. The Pennsylvania statute permits full consideration of factors affecting the "weight" of the aggravating circumstances.

Petitioner argues that his death sentence must be vacated because capital sentencers should be required to evaluate the "weight" of aggravating circumstances at a separate and additional stage from their consideration of

(Continued from previous page)

complete accord with the statute, and petitioner does not claim otherwise. Thus, petitioner's position necessarily rests on the premise that the language of the statute is unconstitutionally confining. Moreover, to the extent that petitioner really does make an "as applied" argument based on the insufficiency of the instructions in his case as opposed to the words of the statute, such a claim is outside the bounds of his certiorari petition, which explicitly challenged the statute on its face.

Second, although petitioner contends that the argued limitations on "weight" of aggravation and "degree" of mitigation result from the statute's "mandatory" feature, it is far from clear how this is so. If there truly is such a thing as "weight" of aggravation which must be considered independently from mitigating circumstances, then elimination of the "mandatory" provision of the statute will not solve the problem. Changing the word "must" to "may" will still leave the jury ignorant of this supposedly crucial step in the sentencing process. The same is true as to foreclosing jury consideration of lesser "degrees" of mitigation. Absent the provision that the verdict must be death upon a finding of one aggravating and no mitigating circumstances, the jury will still believe (assuming petitioner's argument is accepted) that its consideration of mitigating evidence is limited. Thus, it appears that petitioner's real complaint is with the statute's definitions of aggravating and mitigating circumstances, not with its "mandatory" sentencing aspect. The claimed constitutional infirmity on which this Court granted review does not exist.

mitigating circumstances. In fact, Pennsylvania's process of determining mitigating circumstances permits consideration of the very factors which petitioner labels as going to the weight of the aggravating circumstances. He received what the Constitution requires.

Capital penalty proceedings must achieve two results: eliminating arbitrariness and ensuring individualized consideration. Within these broad principles, power is reserved to the states to legislate appropriate procedures. Thus, the real question is not how many "stages" or what labels the Pennsylvania statute provides, but whether it channels sentencer discretion while addressing the particulars of the defendant and his crime. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

Petitioner sidesteps this central issue, instead focusing on the proposition that some murders in the course of a felony – the only aggravating circumstance presented here – are not as bad as others.⁸ It is clear, however, that Pennsylvania procedure gives the jury ample opportunity

⁸ Petitioner goes so far as to suggest that some murders which fall within this aggravating circumstance cannot constitutionally be punished by death at all. Brief for Petitioner at 18. The suggestion is unfounded. In order to be sentenced to death in Pennsylvania for a killing in the course of a felony, the defendant must first have been convicted of first degree murder, which requires a specific intent to kill. *Commonwealth v. Holcomb*, 508 Pa. 425, 466-468, 498 A.2d 833, 854-855 (1985) (plurality), cert. denied, 475 U.S. 1150 (1986) (distinguishing felony murder, which is second degree murder under Pennsylvania law, punishable by life imprisonment, from first degree murder aggravated by carrying out the killing during course of felony, punishable by life or death). The Constitution plainly permits the death penalty in such cases. *Edmund v. Florida*, 458 U.S. 782 (1982).

to give effect to any such concerns in the course of considering mitigating factors. The statute, mirroring this Court's language in *Lockett v. Ohio* and cases since, directs the jury to consider any evidence concerning the defendant's character and record *and the circumstances of the offense*. This last phrase plainly permits the jury to evaluate factors affecting the seriousness of the killing in the course of a felony: the violence or non-violence of the underlying felony (the only such factor identified in petitioner's brief), the defendant's degree of participation in the felonious conduct, the spontaneity of the actual murder, and any others. Indeed, it is difficult to imagine what else the highlighted words could mean.⁹

Significantly, petitioner does not even attempt to argue this issue with reference to this dispositive language of the statutory catchall mitigating circumstances provision. Instead, he maintains that his sentence is invalid because his jury, which was charged consistently with the language in the statute, was not specifically

⁹ All the other aggravating circumstances listed in the Pennsylvania statute can also be categorized as reflecting either on the character and record of the defendant or on the circumstances of his offense. Subsections 9711(d)(1) (killing of fireman or law enforcement officer), (d)(2) (murder for pay), (d)(3) (kidnapping or hostage killing), (d)(4) (killing during airplane hijacking), (d)(5) (killing of prosecution witness), (d)(7) (creation of grave risk of death to others), and (d)(8) (killing by torture) all relate to the circumstances of the offense. Subsections 9711(d)(9) (history of violent criminal conduct), (d)(10) (prior conviction of life- or death-punishable offense), (d)(11) (prior murder conviction), and (d)(12) (prior manslaughter conviction) all relate to the defendant's character or record. App. 3-4.

instructed that it could convert consideration of the weight of the aggravating circumstance into consideration of mitigating circumstances. The point is semantic, not substantive. It is true that the jury was not told to interchange the labels in question. It was told, however, explicitly and repeatedly, that it must consider the circumstances of the offense in deciding if any mitigation existed. It was further informed that "aggravating and mitigating circumstances are circumstances concerning the killing and the killer which makes [sic] a first degree murder case either more serious or less serious" (J.A. 9; R. 145). These instructions, like the statutory language itself, surely granted the jury power to give effect to any concern it had about the seriousness of this killing in the course of a felony; petitioner simply rejected the chance, despite full knowledge of the consequences, to present his own version of events. The failure was petitioner's, not the statute's.¹⁰

¹⁰ Any suggestion that the fault here lay with the instructions as opposed to the statute must be rejected for several additional reasons as well. As noted above, such an as-applied claim is outside the scope of petitioner's certiorari petition, which asserted that the statute was unconstitutional on its face. Furthermore, petitioner's trial attorney, who raised the facial attack after the trial, made no objection that the instructions, as distinct from the statute, were insufficient to allow the jury to consider weight of aggravation. See *Wainwright v. Witt*, 469 U.S. 412, 431 n.11 (1985) (counsel's failure to seek clarification of allegedly ambiguous remarks could be considered in assessing defendant's present interpretation of comments at issue). Most important, as discussed in text below, the bulk of petitioner's argument in this section of his brief is that weight of aggravation and mitigation are, by definition, mutually exclusive.

(Continued on following page)

Petitioner nonetheless insists that weight of aggravating factors cannot be considered in the context of determining mitigation. The two processes, he asserts, represent fundamentally different concepts: evaluating the weight of the aggravating circumstances means deciding whether the criminal and the crime were "sufficiently evil," whereas evaluating mitigating factors means deciding whether there was "some sort of extenuation" (Brief for Petitioner at 20). Petitioner treats his distinction as self-evident; in fact, it is non-existent. Aggravation and mitigation are simply opposite ends of

(Continued from previous page)

Under this approach, a charge that weight of aggravation should be considered in determining mitigation would, in petitioner's words, "twist[] the very concept of mitigation into unrecognizability" (Brief for Petitioner at 20). Necessarily, then, petitioner's real complaint is not that the trial court's instructions on mitigation should have been more specific, but that the statutory fabric itself, by not explicitly providing for the independent consideration of the "weight" of aggravating circumstances, precluded such consideration.

Petitioner argues that the jury's request for reinstruction on mitigating circumstances indicated its desire to impose a life sentence and its frustration that the statute would not allow it to do so. No such conclusion is possible on this record. The jurors made their request, heard the court's response, indicated their satisfaction with the reinstructions – which had emphasized the jury's great latitude to vote for life by deriving any mitigating circumstances from the record – and then agreed that they could find no mitigating circumstances, and that the sentence should be death. The fact that conscientious jurors wished to make sure they understood the law before imposing the ultimate sentence is hardly evidence that they actually wanted to return the opposite verdict.

the same spectrum of conduct.¹¹ The essential point is that the sentencer examine that spectrum in the light of the defendant's character and the circumstances of his offense. That is what this Court has held, what Pennsylvania law requires, and what petitioner's jury was told. Whether the inquiry is undertaken under the label "aggravating circumstances" or "mitigating circumstances" is constitutionally irrelevant.

Thus, the operation of the Pennsylvania sentencing procedure provides no basis for requiring a separate stage to consider the "weight" of aggravating circumstances. Petitioner's primary authority for such a requirement is this Court's precedent in *Sumner v. Shuman* (invalidating statute imposing death for murder by life prisoner) and *Barclay v. Florida*, 463 U.S. 939 (1983) (upholding death sentence based on both statutory and non-statutory aggravating circumstances). In *Sumner*, however, the Court commented on the weight of aggravating circumstances only in rejecting a statute which did not allow for any consideration of the individual circumstances of the defendant or the offense. The Court held that such consideration must occur in some manner during the sentencing process, but by no means indicated that it must occur separately from determination of mitigating circumstances.¹² In *Barclay*, the concurring

¹¹ Webster's International Dictionary, Second Edition, defines "aggravate" as "to make worse or more severe." It defines "mitigate" as "to make or become less severe," and lists as an antonym the word "aggravate."

¹² Indeed, the *Sumner* Court observed:

Beginning with *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a plurality of the Court recognized

(Continued on following page)

opinion simply observed that Florida apparently does permit the sentencer to consider the "weight" of aggravating circumstances even after mitigating circumstances have been determined and balanced against aggravating circumstances. 463 U.S. at 964. But there is no suggestion in any of this Court's opinions that this extra dimension of standardless discretion is constitutionally mandated. On the contrary, the cases make clear that the states are free to take a variety of procedural paths toward the goals of channeling discretion while individualizing the sentencing process.¹³

(Continued from previous page)

that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.*, at 604, 98 S.Ct. at 2965 (emphasis in original). In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), a majority of the Court accepted the *Lockett* plurality's approach.

483 U.S. at 75-76. Obviously, the Court did not contemplate that full consideration of mitigating circumstances was somehow inadequate to address the factors relevant to the "weight" of aggravating circumstances.

¹³ *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) (no "one right way" to order capital sentencing procedure in federal system); *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984) ("To endorse [a] statute as a whole is not to say that anything different is unacceptable"); see, e.g., *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (upholding statute which, unlike most states, performed reviewing function at guilt phase through specific definition of capital murder, while allowing consideration of mitigating

(Continued on following page)

Petitioner's assertion that his sentence was invalid because his jury was not permitted to fully consider the weight of the aggravating circumstance is particularly unconvincing given the facts of this case. This was no petty theft which turned into murder in a moment's panic. Rather, it is precisely the kind of crime which demonstrates why murder in the course of a felony is an aggravating circumstance. Petitioner set forth to commit a robbery by blowing someone's brains out; selected an unsuspecting, tractable victim; determined to kill the victim to avoid identification; gleefully shot him six times in the head; boasted of the ease with which he could get away with such crimes; and vowed to murder his future victims whenever it would be of any use. Petitioner has never - in the trial court, in the state appellate court, or in this Court - identified any particular factor which could have reduced the weight of this aggravating circumstance yet escaped consideration in the context of mitigating circumstances. It is obvious that, given the overwhelming evidence, including petitioner's own detailed statement describing his murderous intent, any attempt to do so would have been rejected by the jury. The circumstances of petitioner's offense were not mitigating. His

(Continued from previous page)

factors at sentencing phase); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding statute which, unlike most states, contained no provision for consideration of mitigating circumstances, as long as jury was permitted to do so in answering special questions at sentencing phase); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding statute which provided for consideration, but no balancing, of lists of aggravating and mitigating circumstances).

displeasure with the jury's understandable assessment of his crime and his character does not establish a constitutional violation.

C. The Pennsylvania statute permits full consideration of facts affecting both enumerated and unenumerated mitigating circumstances.

Petitioner next contends that Pennsylvania's capital sentencing provision governing consideration of mitigating factors, and the jury instructions given in accordance with this provision in this case, are unconstitutionally limiting. This claim is based on the fact that several of the enumerated factors listed as examples in the statute contain descriptive adjectives - e.g., "extreme" emotional disturbance, "substantially" impaired capacity - which purportedly preclude the jury from considering lesser "degrees" of mitigation. As before, however, petitioner disregards the substance of the statute in an effort to create gaps in the sentencing process where none exist. The reality is that Pennsylvania allows the jury to give effect to any degree of mitigation, either as enumerated or unenumerated factors.

The Pennsylvania statute acts to fully advise the jury of the nature and character of mitigating circumstances by providing specific examples followed by a general and all-inclusive definition. This informs, not limits, the jury's discretion, such that, while subjective mitigating factors may be given effect, considerations which are arbitrary or irrational are disfavored. The statute thus provides an appropriate "vehicle" for a "reasoned moral response" specific to the case and the defendant. *Franklin v. Lynaugh*,

108 S. Ct. 2320, 2333 (1988) (O'Connor, J., with Blackmun, J., concurring). By emphasizing to the jury that it has great latitude in deciding what may constitute a mitigating factor, and giving examples in illustration, the Pennsylvania statute increases the likelihood that such factors will be found.

Contrary to petitioner's claim, the adjectives contained in the enumerated mitigating circumstances permit the jury to find these specific factors whenever it wishes to include them in the ultimate sentencing determination. Petitioner's position is that, if the statute speaks, for example, of "substantial" impairment of capacity, then there must be some level of impairment between "zero" impairment and "substantial" impairment which the jury cannot consider.¹⁴ In fact, it is the jury which has the power to determine what is "substantial" – or "significant," or "extreme," or "relatively

¹⁴ The subsections containing such modifiers are as follows:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. §309 (relating to duress), or acted under the substantial domination of another person.

(7) The defendant's participation in the homicidal act was relatively minor.

§ 9711(e), App. 4.

minor" – and what is not. The jury will inevitably and appropriately make this determination in light of whether it believes the evidence in question has mitigating effect. If, for example, the jury feels the defendant to be less culpable because of evidence of intoxication, then it can find that the intoxication caused "substantial" impairment. Indeed, it is difficult to imagine, and petitioner does not suggest, any other manner in which the determination could be made. The legislative choice to include descriptive language to help guide the exercise of sentencer discretion simply does not straiten the jury's ability to return a life verdict.¹⁵

In any event, even if the specific factors listed in the statute limited consideration of any mitigating evidence, the statute's general provision would allow the jury to give effect to such evidence. Subsection (e)(8) of the sentencing law gives the jury the broadest possible power to find a mitigating circumstance in "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense [emphasis added]." Petitioner argues that the jury will nonetheless disregard this open-ended language. It will think to itself,

¹⁵ This Court has recognized the absence of constraints in similar descriptive words when they have appeared in aggravating rather than mitigating circumstances. Indeed, the Court in that context held such language unconstitutional because it was not sufficiently limiting. *Godfrey v. Georgia*, 446 U.S. 420 (1980) (offense "outrageously or wantonly vile, horrible and inhuman"); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (offense "especially heinous, atrocious, or cruel"; use of modifiers such as "outrageously" or "especially" does not restrict jury's discretion). While this flexibility of language works against the capital defendant in an aggravating circumstance, it benefits him in a mitigating circumstance.

he asserts, that the enumerated circumstances are intended to be the exclusive method of considering any evidence which falls within the categories they define, and that the words "any other evidence" in (e)(8) really mean "any other *categories* of evidence." Thus, petitioner declares, the jury will conclude that any evidence not measuring up to the quantitative standards purportedly embedded in the enumerated factors cannot be considered at all. Petitioner's speculation, however, flatly ignores the words of subsection (e)(8). There is no reason to believe the jury will do the same. See *California v. Brown*, 479 U.S. 538 (1987) (Court will not assume jurors ignored plain meaning of jury instruction in favor of defendant's strained, abstract interpretation).

Petitioner seems to assume that mitigating evidence must always be characterized as falling within a category corresponding to an enumerated circumstance, and therefore subject to its purported limitations of degree. In fact, a defendant is never required to present a particular piece of evidence – such as intoxication – in the nomenclature of a particular enumerated circumstance. For example, petitioner pigeonholes his alleged intoxication under (e)(2) (extreme emotional disturbance) and (e)(3) (substantial impairment of capacity to conform to legal requirements). Had he truly wished to urge this evidence on the jury, however – which he clearly did not – he could have done so in some other guise – for example, that it blunted the intensity of his specific intent to kill – or with no labels at all.¹⁶ Similarly, petitioner labors to classify

¹⁶ Of course, there was no evidence in the record that petitioner actually was intoxicated, or even that he had

(Continued on following page)

under subsection (e)(5) (defendant acted under substantial domination of another person) evidence allegedly indicating that he was "ambivalent" about the murder. This ambivalence is supposedly revealed by the fact that he secured the concurrence of his cohorts before he killed the victim.¹⁷ As above, however, there was no need to present such evidence under the ill-fitting (e)(5). He could have made his point at least as effectively without that gloss. If a Pennsylvania defendant fears that his mitigating evidence will lose its force under the purported restraints of the enumerated circumstances, he is under no obligation to subject himself to them. The

(Continued from previous page)

anything to drink. The trial testimony showed only that he bought a bottle of alcohol at some point that evening (R. 24B). Petitioner declined to shed any further light on the issue at the sentencing stage.

¹⁷ The record explodes the notion that petitioner approached his friends because of any doubts he had about pulling the trigger. Petitioner stated clearly that he had decided to kill the victim well before he ordered Dalton out of the car, but that his friends did not believe he would (J.A. 119-20; R. 101-02). His girlfriend begged him not to do it, and George Powell would not even leave the back seat (J.A. 120-21; R. 8B, 28B-29B, 103). Petitioner then returned, in his own words, to "warn" his associates, not to get their permission (J.A. 129; R. 111). They in fact displayed only the most grudging acquiescence (R. 10A, 10B). Petitioner later said that he killed the victim both because it was "necessary" to prevent identification, and to prove a point to his companions (J.A. 133; R. 115). After the murder, he threatened to kill them all if they informed on him; he was confident they would not, in part because he had made them accessories to his crime (J.A. 131; R. 10B-11B, 112-13). This is hardly evidence of an ambivalent amateur who needs his friends' support to complete the act.

statute's catchall provision allows him to present his evidence on his own terms.¹⁸

Finally, even if petitioner's strained parsing of the Pennsylvania statute had revealed any actual bound on

¹⁸ To the extent that petitioner's claim here, like his argument on aggravating circumstances, is intended as an as-applied challenge to the jury instructions in this case rather than a facial attack on the Pennsylvania statute, it must fail. As previously discussed, such a contention, made for the first time in petitioner's brief here, is outside the scope of the certiorari petition; in addition, trial counsel gave no indication that he interpreted the court's instructions as in any way limiting the jury's consideration of mitigating evidence.

As in his argument on aggravating circumstances, petitioner asserts that the jury's request for reinstruction on the catchall mitigating circumstance is significant. Because the court did not respond by specifically telling the jurors to consider "degrees" of mitigation which were "insufficient" under the seven enumerated factors, petitioner contends that the jury did not know it could do so under the eighth, general provision. As before, however, the claim is a chimera. Since the court never imposed any quantitative limits on the jury's consideration of the enumerated factors, and since the jury was told that there were no limits on the kinds of evidence it could consider as an unenumerated factor under (e)(8), the Court simply cannot assume that the jury would have come upon the academic interpretation of the law which petitioner belatedly posits. Compare *Penry v. Lynaugh*, 57 U.S.L.W. 4958 (1989) (where sentencing statute, unlike Pennsylvania's, did not on its face allow jury to find mitigation in defendant's character or record or circumstances of offense, and language of statute may have led jury to believe it could not consider defendant's mental retardation as mitigating factor, specific instruction on mental retardation was necessary).

his ability to argue mitigation, there would be no constitutional violation. The Eighth Amendment does not command the states to indulge every possible theory of mitigation which a capital defendant may devise. Petitioner's "degree of mitigation" claim is reminiscent of the "residual doubt" concept which this Court rejected in *Franklin v. Lynaugh*, 108 S. Ct. at 2327 (plurality opinion); *id.* at 2334-35 (concurring opinion). There the defendant contended that the sentencing jury should have been allowed to consider any residual doubts about his guilt which may have remained in the jurors' minds after convicting him. Here petitioner contends that the jury may have retained some lingering doubt about whether a particular fact amounted to a mitigating circumstance. This Court, however, has never imposed a requirement of absolute certainty on every step in the thought process resulting in a death verdict.

Nor has the Court mandated that capital sentencing must be structured to permit jurors to return a life verdict on inarticulable whim, free-floating emotion, or a shapeless sense of sympathy or mercy undefined by the evidence. *California v. Brown*, 479 U.S. at 542; *id.* at 545 (concurring opinion).¹⁹ The decisions the jury must make are to be reasoned moral judgments, not more emotional

¹⁹ Compare Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 Duq. L. Rev. 103, 156-57 (1982), taking the position that statutory specification of either mitigating or aggravating factors improperly restricts the jury's discretion to deliver a life verdict, and advocating the deconstruction of all such standards: "the principle of reliability in death penalty sentencing . . . requires that a sentencer be permitted to return a life sentence for any reason, or no reason," *id.* at 106. This article provides the blueprint for much of the argument in petitioner's brief.

reactions. *Penry v. Lynaugh*, 57 U.S.L.W. 4958, 4962, 4964 (1989). It is true that such emotions are unavoidable in matters as awesome as life and death. The question, however, is whether the state may ask the jury to test such incipient gut reactions against objective criteria. If an initial notion is not sufficiently strong for the juror to fit it, in his own judgment, into any one of the enumerated or unenumerated mitigating circumstances, then the sentencing scheme appropriately puts that notion aside. Pennsylvania's treatment of mitigating circumstances properly seeks rationality in this fashion. The Constitution should not be read to forbid the effort.

D. Statistics on Pennsylvania death penalty cases, which petitioner has grossly misrepresented, show no pattern of jury nullification to avoid the "mandatory" feature of the Pennsylvania statute.

In a last attempt to cast doubt on his sentencing process, petitioner refers to a computer printout from the Pennsylvania Death Penalty Study, a computerized data base of first degree murder cases maintained by the Administrative Office of Pennsylvania Courts (AOPC). See *Commonwealth v. Maxwell*, 505 Pa. 152, 169, 477 A.2d 1309, 1318, cert. denied, 469 U.S. 971 (1984). Petitioner claims that Pennsylvania juries engage in "nullification" by routinely returning life verdicts in cases where they have unanimously found one aggravating and no mitigating circumstance. This would be in direct disregard of the Pennsylvania statute, which requires a sentence of death in such cases. Specifically, petitioner relies on a list of thirty-six life sentence cases in which, he alleges, there

was a finding of one aggravating circumstance and no mitigating circumstances (Brief for Petitioner at 29; Appendix C at 10a-11a). These verdicts, he declares, prove that Pennsylvania juries are uncomfortable with the "mandatory" feature of the sentencing statute and ignore it at will to achieve a just result.

Petitioner has completely misstated the AOPC data. In fact, virtually all of the thirty-six cases on which petitioner's argument is based were cases where the Commonwealth *presented* one aggravating circumstance, but the jury declined to *find* it. In such cases, the Pennsylvania statute requires a verdict of *life*. The true nature of petitioner's statistics is revealed by the actual AOPC reporting forms filed in petitioner's cases, and by duplication of the computer search which resulted in petitioner's list. Copies of the relevant materials, as well as a detailed explication of the AOPC study, have been separately filed with the Court as a Lodging to Section D of Respondent's Brief. These materials leave no doubt that the AOPC data stand for exactly the opposite of the proposition for which petitioner presents them.

The Pennsylvania Supreme Court has directed the AOPC, its administrative arm, to collect data to assist the court in the statutory proportionality review undertaken in all death penalty appeals. The AOPC study is a computerized store of facts received through a standardized form ("Review Form, Murder of the First Degree") which is sent to the trial judge in each first degree murder case. The judge's responses to the twenty-two questions on the review form are entered in the data base of the AOPC study. The questions seek information such as the age and race of the defendant and victim, the date of the crime

and sentence, and the number and nature of the aggravating and mitigating circumstances involved. Members of the public may retrieve particular data, either in an individual case or across a range of cases, by request to the AOPC. For example, one could obtain a printout of all cases in which twenty-year-old male victims were murdered by males born in 1960, or a printout of all cases in 1986 in which the Commonwealth argued the aggravating circumstance of murder during a hijacking. A sample AOPC review form is contained in the Lodging to Section D of Respondent's Brief at 1L-7L.

For purposes of this case, the relevant questions on the AOPC form are Questions 12 and 13. Both list all of the statutory aggravating circumstances. Question 12, however, asks the trial judge to check off those aggravating circumstances which were "presented at the sentencing hearing by the Commonwealth," while Question 13 asks the trial judge to check off those aggravating circumstances which the sentencer "actually found to have been proven by the Commonwealth beyond [a] reasonable doubt." Petitioner's data is based on Question 12 (aggravating circumstances presented) rather than 13 (aggravating circumstances proven).

Examination of the actual AOPC forms and other court documents for the cases in petitioner's appendix demonstrates his error. In thirty-three of the thirty-six cases, each form clearly shows one line checked under Question 12 – that is, one aggravating circumstance presented at the sentencing hearing by the Commonwealth. Each of these forms also shows no lines checked under Question 13 – that is, no aggravating circumstance actually found to have been proven by the

Commonwealth.²⁰ In the thirty-fourth case, the absence of a finding of any aggravating circumstances is established by the official verdict sheet returned by the jury.²¹ The remaining two life sentence cases on petitioner's list were not jury verdicts at all: In one, the jury sentenced the defendant to death, but the trial judge subsequently vacated the death sentence.²² In the other, the jury deadlocked, which, under the Pennsylvania sentencing statute, § 9711(c)(1)(v), automatically results in the entry of a life sentence by the trial judge.²³ Thus, the documents demonstrate that none of the cases on petitioner's list resulted in a life sentence despite a finding of one aggravating and no mitigating circumstances. The data do not establish a single instance of jury nullification.

²⁰ The first three pages of each of the 33 forms are found at pages 13L-36L, 40L-72L, 77L-118L of the Commonwealth's Lodging. Question 12 appears on page 2 of each form, and Question 13 appears on page 3 of each form.

²¹ *Commonwealth v. Melson* (cited as "Nelson" on petitioner's list). The AOPC form in *Melson* does show one line checked off under Question 13. This was apparently in error, however, since the verdict sheet filled out by the jury itself does not show that any aggravating circumstances were found. The verdict sheet and AOPC form appear in the Commonwealth's Lodging at 73L-76L.

²² *Commonwealth v. Graves*. The AOPC form in *Graves* appears in the Commonwealth's Lodging at 37L-39L. The case's procedural history is also detailed in a reported appellate opinion, 310 Pa. Super. 184, 456 A.2d 561 (1985).

²³ *Commonwealth v. Barron*. The AOPC form for this case, at 10L-12L in the Commonwealth's Lodging, shows one line checked off under Question 13, aggravating circumstances found. The form does not indicate, however, whether the jury reached a decision on mitigating circumstances before it deadlocked. As a result, it cannot be ascertained whether this is a case to which the "mandatory" feature of the statute applied.

The same result is made apparent by a duplication of the AOPC computer search which generated the list of cases in petitioner's Appendix C. This duplication can be accomplished only by a search for all cases in which the total number of aggravating circumstances *presented* was one, and the total number of mitigating circumstances presented was zero. A computer printout resulting from such a search appears in the Commonwealth's Lodging at 8L.²⁴ It matches petitioner's list exactly, with the exception of the addition of new cases added to the AOPC's data base since the time of petitioner's request for information. This printout demonstrates that petitioner's list does not represent cases in which one aggravating circumstance was actually found, and so does not indicate any jury nullification.²⁵

Indeed, even if petitioner's data had truly represented cases where an aggravating circumstance was found, they would not have supported his nullification

²⁴ The precise search made is indicated by the computer codes appearing in the printout's caption. The codes used here are "V122" and "V125." A key to these codes appears at the end of the printed AOPC form (Lodging at 7L). "V122" is listed in the key as "Total Aggravating Presented at Sentencing," corresponding to Question 12 on the form. "V125" is listed in the key as "Total Mitigating Presented at Sentencing," corresponding to Question 16. The designation in the caption of "V122 EQ 1" means total aggravating circumstances presented equal to one. The designation in the caption of "V125 EQ 0" means total mitigating circumstances presented equal to zero.

²⁵ A second computer printout also appears in the Commonwealth's Lodging, at 9L. This printout is based on Question 22(1), which asks whether a sentence of death was based

(Continued on following page)

claim, for there is a second flaw in his analysis. Petitioner's data do not reflect findings as to mitigating circumstances. The only question on the AOPC form concerning mitigating circumstances is Question 16, which asks only for mitigating circumstances "presented at the sentencing hearing by the defendant."²⁶ As in petitioner's own case, however, the jury is free to find mitigation arising from the trial record even if the defendant has not presented evidence at the sentencing hearing or argued any specific mitigating circumstances. Thus, the juries in petitioner's cases may well have found mitigation, and returned life verdicts because they found the aggravating circumstances not to outweigh the mitigating circumstances. There is simply no basis for concluding that the sentences were the result of "nullification" rather than the proper operation of the statute.²⁷

(Continued from previous page)

on at least one aggravating and no mitigating circumstances, or on aggravating circumstances which outweigh mitigating circumstances. This is the only instance in which the AOPC is able to record an actual jury finding that no mitigating circumstances exist. Forty-three such cases, all death sentences, appear on this printout.

²⁶ There is no question for specifying mitigating circumstances found, since the sentencing statute does not require the jury to state what aggravating or mitigating circumstances it may have found in reaching a life verdict.

²⁷ In addition to presenting statistics purportedly showing that similarly situated Pennsylvania defendants have received life sentences, petitioner also attempts to diminish his deservingness of death by citing cases from other jurisdictions in which life sentences were returned (Brief for Petitioner,

(Continued on following page)

Finally, it does not follow that what petitioner views as nullification, even were it present, is of any constitutional significance in the present context. Nullification is

(Continued from previous page)

Appendix B). The exercise is futile. It is hardly surprising that petitioner is able to handpick, from the whole of American jurisprudence, cases in which brutal facts can be highlighted, yet no death penalty was imposed. What is noteworthy is that the list is relatively short. It becomes even shorter when adjustment is made for the factual misrepresentations and omissions in petitioner's summaries of the cases.

In *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984), *cert. denied*, 470 U.S. 1009 (1985), for example, the crime was indeed terrible (the victim was raped and set on fire), but the jury sentenced the defendant to death, not life, as petitioner claims. In *State v. Serrone*, 95 N.J. 23, 468 A.2d 1050 (1983), the defendant killed a father and daughter, but could not be sentenced to death because New Jersey had no death penalty at the time. N.J. Stat. Ann. § 2C:49-1 *et seq.*, L. 1983 c. 245 1-12, effective July 5, 1983. And in *Spaziano v. State*, 433 So. 2d 508 (Fla. 1983), *aff'd*, *Spaziano v. Florida*, 468 U.S. 447 (1984), and *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041 (1981), the juries returned advisory verdicts of life, but were not aware – unlike the judges who rejected the advisory verdicts and imposed death – that the defendants had violent felony records.

In other cases, the defendants presented significant mitigating evidence, unmentioned by petitioner in his summaries, thus changing the sentencing calculus greatly from that in petitioner's own case. *E.g.*, *State v. Grilz*, 136 Ariz. 450, 666 P.2d 1059 (1983) (insanity claim); *People v. Brown*, 169 Cal. App. 3d 728, 215 Cal. Rptr. 465 (1985), *cert. denied*, 108 S. Ct. 717 (1988) (defendant under influence of PCP).

In numerous other cases in petitioner's appendix, the reported opinion simply does not discuss whether mitigating circumstances existed, making any comparison with petitioner's

(Continued on following page)

an irremovable power of juries; it may be eliminated only by eliminating the jury or by rendering its decision non-final or wholly advisory. *See Gregg v. Georgia*, 428 U.S. at 199 n.50. The practice of nullification was of concern in *Woodson v. North Carolina* because it was a vehicle for arbitrariness. The mandatory penalty in *Woodson* purported to eliminate arbitrariness by completely removing sentencing discretion. Instead, discretion in the form of nullification remained, without guidance, wholly arbitrary, but at the trial rather than the sentencing phase. The Pennsylvania statute, in contrast, actively guides the sentencer's discretion.

The Constitution demands guidance to reduce the risk of an arbitrary verdict; it does not demand a guarantee that arbitrary life verdicts will never result. Where discretion has been sufficiently guided before the alleged nullification takes place, a nullification argument becomes a *non sequitur*. Indeed, if the statute adequately guided the sentencer's discretion, an apparently arbitrary verdict cannot accurately be deemed a nullification.

In short, the Constitution guards against arbitrariness. It does not reject nullification as such, but rejects arbitrary nullification. Thus, notwithstanding his faulty analysis of the data, petitioner's nullification argument is superfluous. Since the statute here adequately guides sentencing discretion and gives effect to relevant mitigating evidence, the resulting verdicts cannot be deemed

(Continued from previous page)

case impossible. *E.g.*, *State v. Schrock*, 149 Ariz. 433, 719 P.2d 1049 (1986); *Hogan v. State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *State v. Kester*, 38 Wash. App. 590, 686 P.2d 1081 (1984).

arbitrary. The Pennsylvania capital sentencing statute satisfies the Eighth Amendment.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

ERNEST D. PREATE, JR.*
Attorney General of Pennsylvania

RONALD EISENBERG
Special Deputy Attorney General;
Chief, Appeals Unit, Philadelphia
District Attorney's Office

HUGH J. BURNS, JR.
Special Deputy Attorney General;
Assistant District Attorney,
Philadelphia County

EWING D. NEWCOMER
Special Deputy Attorney General;
Assistant District Attorney,
Fayette County

GAELE McLAUGHLIN BARTHOLD
Special Deputy Attorney General;
Deputy District Attorney,
Philadelphia County

ROBERT A. GRACI
Chief Deputy Attorney General;
Appeals and Legal Services Section

*Counsel of Record

Office of the Attorney
General of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

APPENDIX

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas. —

If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury. -

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as

defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), committed either before or at the time of the offense at issue.

(e) **Mitigating circumstances.** - Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) **Sentencing verdict by the jury.** -

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) **Recording sentencing verdict.** - Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) **Review of death sentence.** -

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or

App. 6

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence or because the sentence of death is disproportionate to the penalty imposed in similar cases, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

(8)

No. 88-6222

Supreme Court, U.S.
FILED

AUG 25 1989

SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT WAYNE BLYSTONE,
Petitioner,
v.
PENNSYLVANIA,
Respondent.

On Writ Of Certiorari To The Supreme Court
Of The Commonwealth Of Pennsylvania

REPLY BRIEF FOR THE PETITIONER

PAUL R. GETTLEMAN
Counsel of Record
R.D. 1, Box 325
Zelienople, PA 16063
(412) 521-0500
BRUCE S. LEDEWITZ
School of Law, Hanley Hall
Duquesne University
900 Locust Street
Pittsburgh, PA 15282
(412) 434-5011
STEFAN PRESSER
125 S. 9th Street, Suite 701
Philadelphia, PA 19107
(215) 592-1513
Counsel for Petitioner

26pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
ARGUMENT	
A. Introduction	1
B. Petitioner's Jury Would Not Have Understood That In Deciding The Appropriate Sentence It Was Free To Evaluate The Weight Of The Particular Aggravating Circumstance Found In This Case ..	2
C. Petitioner's Jury Would Not Have Understood That It Was Free To Consider All Degrees Of Mitigation In Deciding On Petitioner's Sentence	9
D. Respondent's Lodging Provides Independent Evidence That Pennsylvania Jurors Refuse To Be Straight-Jacketed By The Commonwealth's Rigid Capital Sentencing Process	15
E. All Of The Restrictions In The Statutory Instructions Operate To Prevent The Sentencing Jury From Expressing Its Reasoned Moral Response To The Evidence In Determining The Appropriateness Of A Death Sentence	21

TABLE OF AUTHORITIES

CASES:	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	4
<i>Andres v. United States</i> , 333 U.S. 740 (1948)	3
<i>Bachellar v. Maryland</i> , 397 U.S. 564 (1970)	4
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	7
<i>California v. Brown</i> , 479 U.S. 538 (1987)	4, 13, 22
<i>Commonwealth v. Buehl</i> , 510 Pa. 363, 508 A.2d 1167 (1986)	12
<i>Commonwealth v. Crawley</i> , 514 Pa. 539, A.2d 334 (1987)	21
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	2, 13
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985)	4, 13
<i>Franklin V. Lynaugh</i> , 108 S.Ct. 2320 (1988)	13
<i>Godfrey v. Georgia</i> , 466 U.S. 420 (1980)	4
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	3, 4
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987)	9, 15
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	2, 13, 14
<i>Mills v. Maryland</i> , 108 S.Ct. 1860 (1988)	4
<i>Penry v. Lynaugh</i> , 109 S.Ct. 2934 (1989)	14, 15, 22
<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976)	17
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	4
<i>Satterwhite v. Texas</i> , 108 S.Ct. 1792 (1988)	7
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986)	13, 14
<i>Sumner v. Shuman</i> , 483 U.S. 66 (1987)	1, 2, 5
<i>Wainwright v. Witt</i> , 469 U.S. 412 (1985)	9
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	17, 20
STATUTES:	
42 Pa. C.S. § 9711(c)(1)	10
42 Pa. C.S. § 9711(d)(6)	10
42 Pa. C.S. § 9711(e)(1)	10, 12
42 Pa. C.S. § 9711(e)(2)	9, 10, 12
42 Pa. C.S. § 9711(e)(5)	10, 13
42 Pa. C.S. § 9711(e)(8)	10, 11

ARGUMENT

A. Introduction

Respondent's brief advances several arguments for upholding the statutory instruction given to the jury at the sentencing phase of petitioner's trial that "[i]f you find an aggravating circumstance and no mitigating circumstance, it is your duty to return a verdict of death." R. 148.¹ These arguments rest upon shifting premises as to what the instruction means.

Sometimes Respondent suggests that the language of the instruction is imperative only in "syntax," not in substance. (Resp. Br. 17.) This is a variant of a contention made repeatedly in the brief, that the words used in capital sentencing instructions really do not matter because the jury will gloss them according to the outcome that it wants to reach in any event. (*E.g.*, Resp. Br. 19, 23-24, 26, 30-31.) We discuss this contention at pages 3-6, 11-12 *infra*.

Elsewhere Respondent concedes that the mandatory language of the statutory instruction is imperative in substance and "requires a death sentence" under the circumstances it describes (Resp. Br. 16). We discuss in Part B at pages 2-11 *infra* why the instruction—which we agree has this plain meaning—violates the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner v. Shuman*, 483 U.S. 66, 73 (1987).

Still elsewhere, Respondent suggests that the imperative language of the instruction is merely precatory, reinforcing a "minimal level of oversight" of the jury so as to prevent "gut level sentencing" (Resp. Br. 20). Respondent explains that the instruction

¹ 42 Pa. C.S. § 9711(c)(1) provides that "[b]efore the jury retires to consider the sentencing verdict, the court shall instruct on the following matters: . . . (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance. . . ."

encourages the jury to determine any mitigating circumstances, and to weigh them against any aggravating circumstances, most carefully.

(*Ibid.*) Plainly, this is not the sole effect of the instruction. See pages 6-9 *infra*. But even if it were, we show in Part C at pages 11-19 *infra* that by confining the jury within Pennsylvania's crabbed definitions of mitigating circumstances, the instruction unconstitutionally precludes the jury from considering "as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as the basis for a sentence less than death," *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

B. Petitioner's Jury Would Not Have Understood That In Deciding The Appropriate Sentence It Was Free To Evaluate The Weight Of The Particular Aggravating Circumstance Found In This Case

Respondent appears to concede that the weight of a particular aggravating circumstance in an individual defendant's case is a factor that the sentencer must always be free to consider in deciding whether death is the appropriate penalty.² Respondent suggests, for example, that in certain robbery-murder cases—a "petty theft which turn[s] into murder in a moment's panic" (Resp. Br. 28)—a death sentence might not be appropriate. But Respondent argues that any aspect of a crime which might lead a jury to conclude that death is not appropriate "may be expressed as a mitigating circumstance under the Pennsylvania statute."

² This constitutional requirement is a corollary of the Eighth Amendment command of individualization in capital sentencing because generic aggravating circumstances such as the felony-murder aggravating circumstance found in petitioner's case "in some cases . . . may not be sufficient to render death an appropriate sentence," *Sumner v. Shuman*, *supra*, 483 U.S. at 80.

The weight to be attached to aggravating circumstances arising from the defendant's record or his offense is simply another way of describing whether any mitigating circumstances exist in the defendant's character and the nature of his crime.

(Resp. Br. 12)

This argument is part of a pattern in Respondent's brief to treat the actual words used in capital sentencing instructions as unimportant. Thus, the statutory word "must" is characterized as mere "syntax in the imperative" (Resp. Br. 17), as if it had a wholly formal quality. Despite the precision with which Pennsylvania's statutory instructions frame the capital sentencing decision in terms of specific "aggravating circumstances" on the one hand and "mitigating circumstances" on the other, Respondent asserts that "[a]ggravation and mitigation are simply opposite ends of the same spectrum of conduct" (Resp. Br. 25-26), with the "end result . . . that the jury may always choose life over death by deciding that one or more mitigating circumstances exist, and that any aggravating circumstances do not outweigh the mitigating circumstances" (Resp. Br. 19). The image presented here is of a jury that first decides what sentence it wishes to impose and only then considers how it can manipulate its instructions to achieve the desired result. Similarly, in discussing the qualifying language of the statute's enumerated mitigating circumstances, Respondent says that adjectives of limitation—such as "extreme mental or emotional disturbance," 42 Pa. C.S. § 9711(e)(2)—"permit the jury to find these specific factors whenever it wishes to include them in the ultimate sentencing determination [I]t is the jury which has the power to determine what is . . . 'extreme' . . . and what is not." (Resp. Br. 30-31). Respondent calls this "flexibility of language." *Id.* at 31 n. 15.

This Court has never treated capital sentencing instructions so lightly. See, e.g., *Andres v. United States*, 333 U.S. 740 (1948). To the contrary, in death penalty cases since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court has viewed the quality

of sentencing instructions as crucial to the kind of channeled decisionmaking that the Constitution requires. *E.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980). In *Gregg* the plurality explained the importance of jury instructions:

The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931); Fed. Rule Civ. Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Id. at 192-93 (footnote omitted). Thus, the issues of instructional interpretation that divided the Court in such cases as *Mills v. Maryland*, 108 S.Ct. 1860 (1988), and *California v. Brown*, 479 U.S. 538 (1987), bespeak the underlying assumption shared by all the Justices that the exact terms of capital sentencing instructions *do* matter.

This Court has repeatedly recognized the importance of the specific language used in jury instructions in every context in which they are given. See, *e.g.*, *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Addington v. Texas*, 441 U.S. 418 (1979). In *Francis v. Franklin*, 471 U.S. 307, 324-25 n. 9 (1985), the Court described the premises on which these many cases rest.

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights. *E.g.*, *Bruton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*,

378 U.S. 368 (1964). Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions. As Chief Justice Traynor has said: "[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case." R. Traynor, *The Riddle of the Harmless Error* 73-74 (1970) (footnote omitted), quoted in *Connecticut v. Johnson*, 460 U.S. 73, 85, n. 14 (1983) (opinion of BLACKMUN, J.).

Once care is taken to examine the specific instructions that the jury received at petitioner's trial, it becomes entirely clear that the jury would not have understood that it was free to do what Respondent now tells this Court was a part of the jury's proper sentencing task—to evaluate the weight of the felony-murder aggravating circumstance as a "basis on which to determine whether the death sentence . . . [was] the appropriate sanction in . . . [this] particular case," *Sumner v. Shuman*, *supra*, 483 U.S. at 78. Respondent's suggestion that the jurors would have known that they were supposed to treat the lack of aggravation as a "mitigating circumstance" simply flies in the teeth of these instructions.

In the first place, the jury's understanding of what "mitigating circumstances" mean was conditioned by the enumerated mitigating circumstances, which Respondent admits are meant to be "specific examples" (Resp. Br. 29) of mitigation and which were thrice read to the jury (R. 149-150; 153). These were prefaced by the Court's statement: "I am going to read to you everything under the Crimes Code that you might consider as a mitigating circumstance" (R. 148.) The enumerated mitigating circumstances identify factors such as whether the "defendant has no significant criminal history," 42 Pa. C.S. § 9711(e)(1), and whether "[t]he defendant was under the influence of extreme mental or emotional disturbance," 42 Pa. C.S. § 9711(e)(2). When all of the enumerated mitigating circum-

stances are reviewed,³ it is obvious that a jury hearing them, and treating them as examples of the meaning of mitigation, would conclude that mitigation should be taken in its normal, common-sense meaning, viz., something favorable or extenuating about the defendant or his crime. No jury hearing these examples would consider "mitigating" the mere fact that the murder could have been worse.⁴

³ See, e.g., R. 149:

These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; and any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.

⁴ Respondent's suggestion that mitigation would be understood by a jury to include the relative absence of aggravation is belied by Respondent's example of a presumably less aggravated murder, a "petty theft which turned into murder in a moment's panic" (Resp. Br. 28). Respondent apparently agrees that a sentencing jury must be free to give a life sentence in such a case. But it is difficult to imagine a jury conceiving as a "mitigating circumstance" the fact that a robber spontaneously decides to kill his victim when the theft goes bad. The reason death seems inappropriate in Respondent's hypothetical is that it is a run-of-the-mill crime that unfortunately occurs every day in our country. Such a crime might well be thought by a jury to be insufficiently terrible to warrant death. There is nothing however, that is "mitigating" about such a murder. The fact that it is not one of those extreme crimes for which a juror might think the death penalty appropriate cannot linguistically or logically be made to fit within the concept of mitigation.

Second, even if the common meaning of "mitigating" and the examples given in the enumerated circumstances were not enough to convince a conscientious juror that s/he was not at liberty to consider a relative absence of aggravation "mitigating," the mandatory language of the statutory instructions would certainly do so. The instructions distinguish between two mutually exclusive situations and tell the jury what it is to do in each. When the jury finds any aggravating circumstance and one or more mitigating circumstances, it is told that it must weigh aggravation against mitigation. But when the jury finds an aggravating circumstance and no mitigating circumstance, it is told simply that its duty is to "return a verdict of death."⁵ These instructions would suggest to any reasonable juror that *only if and after a mitigating circumstance has been found* does it become permissible to weigh aggravation; and that when—as in petitioner's case—no mitigating circumstance is found, the jury is forbidden to evaluate the weight of aggravation and to deem it insufficient to warrant death.

Respondent suggests that even if the jury was not free to assess the weight of aggravation, such a restriction would not have mattered in petitioner's case. (Resp. Br. 28-29). We take this to be a species of harmless error argument, to be judged under the standards of *Satterwhite v. Texas*, 108 S.Ct. 1792 (1988), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). So judged, it fails conspicuously.

Petitioner concedes that the evidence of mitigation in this record is not strong. (Indeed that is the starting point of petitioner's argument in Part C *infra* concerning the vice of the

⁵ See, e.g., R 148:

If you find an aggravating circumstance and no mitigating circumstances, it is your duty to return a verdict of death. If you find that there are mitigating circumstances, then you would need to determine whether the aggravating circumstance or aggravating circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty.

instructions given at his trial which forbade consideration of mitigation that did not meet certain quantitative standards.) But the jury in petitioner's case apparently did not share Respondent's view that the decision as to penalty was foreordained. After beginning deliberations, the jury asked for reinstruction on mitigation (R. 153), and one juror asked for additional instruction on the eighth provision.⁶ (R. 154). The penalty verdict took a substantial amount of time for the jury to reach. This is not a case in which the jury returned a death sentence without difficulty.

And there are reasons why a juror might have questioned the weight of aggravation in this case. Respondent's brief states that petitioner "selected an unsuspecting, tractable victim" (Resp. Br. 28), "a special education student." (Resp. Br. 2). But these circumstances might have seemed less aggravating to the jury than Respondent makes them sound, since there is absolutely no evidence in the record that petitioner knew these characteristics of the victim. Certainly petitioner did not, as Respondent implies, "select" the victim on such a basis. Again, Respondent's brief emphasizes petitioner's purported enjoyment of the killing, as recounted to a police informant three months after the crime. (Resp. Br. 28) But the jury could have found in this recounting an element of inflation designed to impress the informant. Such braggadocio about murder obviously would not cast petitioner in a positive light, but neither would the jury necessarily take it at face value in assessing the quality of aggravation attending the crime.

In all, the question whether petitioner's crime was sufficiently aggravated to call for the death penalty might have been resolved either way by his jury if the jurors had been permitted to address it. For this reason, instructions foreclosing the jury's consideration of that question altogether cannot be found harmless beyond a reasonable doubt.

⁶ "(8) any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."

C. Petitioner's Jury Would Not Have Understood That It Was Free To Consider All Degrees Of Mitigation In Deciding On Petitioner's Sentence

Petitioner pointed out in his brief that the enumerated mitigating circumstances defined by Pennsylvania's statute and charged to his jury contain numerous terms of limitation; for example, enumerated mitigation is limited to "extreme mental or emotional disturbance." 42 Pa. C.S. § 9711(e)(2); see R. 149, 153. Combined with the instruction that the jury must return a death sentence if it finds an aggravating circumstance and finds no mitigating circumstances, these limitations foreclose the jury's consideration of "nonstatutory mitigating circumstances," *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987). Respondent's brief answers that the restrictions can be evaded by the sentencing jury in various ways.

Respondent first argues that all degrees of mitigation can be considered under the enumerated mitigating circumstances because "it is the jury which has the power to determine what is 'substantial'—or 'significant,' or 'extreme,' or 'relatively minor'—and what is not." (Resp. Br. 30-31.) If the jury is inclined to rely on mitigating evidence in the sentencing decision, it can find such evidence to be "extreme" (or within whatever other limitation of degree applies) "whenever it wishes." (Resp. Br. 30.)

This is another instance of Respondent's general tendency to disparage the effect of jury instructions. (See pages 3-6 *supra*.) Respondent assumes that the sentencing jury will first decide what evidence it wants to consider and then make any factual finding necessary to bring the evidence within the terms of the court's sentencing instructions. But a conscientious jury will follow the court's instructions and will, for example, not consider "mental disturbance," "emotional disturbance" or duress unless the evidence shows them to be "extreme." If juries cannot be expected to function in this manner, it is difficult to imagine why we require them to swear to follow their instructions, see, e.g., *Wainwright v. Witt*, 469 U.S. 412 (1985), and

why judges invest the countless hours that they do in deciding such issues as whether juries should be charged that negligence or recklessness is the proper standard of liability for specific torts or crimes.

Respondent's second argument is that even if certain relevant mitigating evidence is excluded by the restrictions embodied in the first seven enumerated mitigating circumstances, the jury can consider such evidence under mitigating circumstance number eight:

Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(42 Pa. C.S. §9711(e)(8)). (See Resp. Br. 31-34). But this approach would make nonsense out of every one of the elaborately delineated qualifications of enumerated mitigating circumstances (1) through (7). (See footnote 3 *supra*.) No reasonable juror would suppose that the Legislature and the judge had required him or her to determine whether emotional disturbance was "extreme" for the purpose of including or excluding it as mitigation under enumerated mitigating circumstance number (2), only to turn around and say that non-extreme emotional disturbance was to be considered mitigating anyway under circumstance number (8).

Respondent typographically emphasizes the word "any" in the phrase "any other evidence of mitigation" in circumstances (8). (Resp. Br. 31). But Respondent does not tell us why the emphasis does not extend to the word "other" or what a juror is to make of that word. How could evidence of emotional disturbance that had just been considered and rejected under circumstance (2) be considered "any other evidence of mitigation" under circumstance (8)? Obviously the very same facts already evaluated under circumstance (2) could not be considered "any other evidence" within circumstance (8).

Indeed, Respondent's argument about the scope of circumstance (8) is completely undermined by the accurate descrip-

tion that Respondent gives of the first seven enumerated mitigating circumstances. At several points Respondent calls these circumstances "examples" (Resp. Br. 12, 13) or "non-exclusive statutory examples" (Resp. Br. 19) or "specific examples" (Resp. Br. 29). Petitioner agrees that the seven specific mitigating circumstances are examples of the general category of mitigation, and that the jury will understand them as such. But then it inescapably follows that if a particular fact—non-extreme emotional disturbance or non-extreme mental disturbance—is excluded by the "example," it is not the sort of fact that can be considered at all in mitigation.

Respondent's final argument as to why these terms of limitation do not matter is that the defendant needs not utilize the first seven enumerated mitigating circumstances, but may simply rely on circumstance (8) or submit the mitigating evidence "with no labels at all" (Resp. Br. 32). This is more cynicism about jury instructions, in the same vein that we have noted at pages 3-6 and 11-12 *supra*. Instructions tell juries what to do with evidence. Whether or not a defendant puts "labels" on evidence, the trial judge's instructions define the issues that the jury is to resolve through the use of that evidence. Here the trial judge read the entire list of enumerated mitigating circumstances to the jury no less than three times. (R. 149-50; 153). The list was replete with elaborate definitions of specific mitigating factors and with adjectives of degree. Respondent's suggestion that a jury will ignore all this and give unstructured consideration to any mitigating evidence that a defendant presents "on his own terms" (Resp. Br. 34) is bizarre.

Contrary to Respondent's submissions (Resp. Br. 32-33 & nn. 16 & 17), there was some mitigating evidence of record that was excluded by the instructions' restrictions on mitigation. Respondent says that "there was no evidence in the record that petitioner actually was intoxicated, or even that he had anything to drink." (*Id.* at 32-33 n. 16) The relevant testimony of Jacqueline Guthrie was as follows:

Q Did you go to any parties that night?

A No.

Q You weren't drinking that night?

A Scott brought a fifth of whiskey.

Q Were you drinking?

A Yes.

Q How much did you have to drink?

A I had maybe two drinks.

(R. 24-B) The jury would have been entitled to find that the "you" who were drinking referred to both petitioner and the witness.

Petitioner agrees with Respondent that this testimony does not establish "intoxication." But that very point illustrates why the instructional limitations on mitigation are significant. A capital defendant who could prove that he was severely enough intoxicated would apparently be entitled to consideration of his intoxication under both enumerated mitigating circumstances (2) and (3). See *Commonwealth v. Buehl*, 510 Pa. 363, 506 A.2d 1167 (1986) (evidence of drug use at the time of the offense is admissible to prove circumstances (2) and (3)). A defendant, however, who had been drinking only moderately would not come within these enumerated mitigating circumstances. Thus, the jury would be completely precluded from considering whatever degree of impairment or emotional disturbance the defendant's drinking had caused. Mitigation of this degree could not be cumulated with other kinds of mitigation in the defendant's favor;⁷ and if no single mitigating factor met the

⁷ At pages 3 and 30-31 of petitioner's brief, we have summarized the evidence suggesting that petitioner experienced a measure of ambivalence about the killing and might not have pulled the trigger if his confederates had protested. At Resp. Br. 33 n. 17, Respondent argues contrary inferences from the same evidence. A jury could have interpreted the evidence either way. While not strong enough to establish the enumerated mitigating circumstance that "[t]he defend-

quantitative standards of the enumerated mitigating circumstances, the jury would also be precluded from evaluating the weight of any aggravating circumstance if found (see Part B *supra*), and would be required to impose a death sentence.

Respondent's final argument in defense of the limitations of the enumerated mitigating circumstances is that even if they do restrict what a capital defendant can urge in mitigation, such a restriction does not violate the Constitution.

The Eighth Amendment does not command the states to indulge every possible theory of mitigation which a capital defendant may devise.

(Resp. Br. 34-35).

What Respondent is apparently arguing is that the Eighth Amendment allows a State to limit the effect of mitigating evidence to certain theories to preclude its consideration beyond the confines of those specific theories. Even if this were an accurate analysis of the operation of the Pennsylvania Statutory instructions—which, as we shall see in a moment, it is not—the Respondent's submission conflicts radically with the rule of *Lockett v. Ohio*, 438 U.S. 586, 606 (1978), that a capital sentencer must be allowed to give "independent mitigating weight to aspects of the defendant's character and record and the circumstances of the offense . . ." (emphasis added). To be sure, the States can forbid the consideration of such matters as "mere sympathy," *California v. Brown*, 479 U.S. 538 (1987), and "residual doubt," *Franklin v. Lynaugh*, 108 S.Ct. 2320 (1988); but that is because "mere sympathy" and "residual doubt" have nothing to do with a defendant's character or record or the circumstances of the offense that bear rationally

ant . . . acted under the substantial domination of another person" (42 Pa. C.S. § 9711 (e)(5); see R. 149 153), the evidence was worthy of consideration. As *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), teach, evidence needs not compel a finding in mitigation in order to deserve a capital sentencer's consideration.

upon the defendant's individual culpability. See 479 U.S. at 541-42 and 108 S.Ct. at 2327 (plurality opinion), 2334-35 (O'Connor, J., concurring in the judgment). In direct contrast, when the "theory of mitigation" that the State seeks to exclude comes within the ambit of relevant mitigation defined by *Lockett*, this Court has struck down such attempted exclusions. See *Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of good behavior to show future adaptability to prison life could not be excluded); *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989) (instructions to jury did not allow full consideration of evidence of mental retardation and childhood abuse).

Respondent does not explain what "theory of mitigation" the State is seeking to exclude by restricting consideration of mental or emotional disturbance or duress to that which is "extreme," by restricting consideration of the influence of other actors to the "substantial domination of another person," and so forth. But degrees of mental and emotional disturbance or duress that are less than extreme and kinds of influences of other persons that do not take the form of substantial domination are all relevant under *Lockett*. The sentencer must be permitted to consider these sorts of factors in full.

In any event, the effect of Pennsylvania's restrictions on mitigating circumstances is not, as Respondent suggests, to exclude only certain "theories" of mitigation. The effect of the statutory instructions is to exclude the evidence of mitigation itself from consideration by the sentencer. To use the most dramatic example,⁸ evidence of mental or emotional disturbance that is real but not "extreme" may not be considered at all under enumerated circumstance (2). If the defendant's only evidence of mental or emotional disturbance fails to meet this particular quantitative test, it must be put totally out of account in deciding whether the defendant deserves to die. It

⁸ This example is germane to petitioner's case because evidence of alcohol consumption is admissible to prove circumstance (2). See pages 15-16 *supra*.

cannot serve even to offset aggravation that is not extreme; for, unless an enumerated mitigating circumstance is found, the jury is forbidden to consider the comparative weight of the aggravation. Thus an entire stratum of mental and emotional disturbance is excluded from consideration for all purposes and under all conditions. Whatever discretion the States may have in prescribing the weight and manner of considering mitigating evidence, there is no doubt that the Eighth Amendment "condemn[s] any procedure in which such evidence has no weight at all." *Penry v. Lynaugh*, *supra*, 109 S.Ct. at 2967 (Scalia, J. dissenting) (quoting *Barclay v. Florida*, 463 U.S. 939, 961 n. 2 (1983) (Stevens J., concurring)).

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the defendant was permitted to and did introduce a wide range of mitigating evidence. Nevertheless, a unanimous Court reversed his death sentence because the advisory jury was instructed to consider only the seven statutorily enumerated mitigating circumstances and the sentencing judge apparently understood himself to be similarly prohibited from considering mitigation outside of those categories. The Pennsylvania instructions similarly forbid consideration of mitigating evidence relevant to, but failing to satisfy the restrictions in, seven statutorily defined circumstances. The addition of an eighth circumstance consisting of "any other" evidence of mitigation does not cure the problem because a juror would not expect to reconsider under that provision evidence which s/he had just found insufficient to come within the specific limitations of one of the preceding seven circumstances.

D. Respondent's Lodging Provides Independent Evidence That Pennsylvania Jurors Refuse To Be Straight-Jacketed By The Commonwealth's Rigid Capital Sentencing Process

At the outset counsel for the petitioner offer their apology to the Court as well as to Respondent for the error in the statistical data originally offered to prove the existence of jury nullification. Respondent's Lodging of the relevant "Review Forms" leaves no doubt that the computer-generated sheet

entitled "life only, 1 aggravating and 0 mitigating" obtained by petitioner from the Administrative Office of Pennsylvania Courts (AOPC), did not as requested reflect instances in which the jury found an aggravating circumstance and no mitigating circumstance but failed to impose a sentence of death. Rather, these appear to be instances in which the prosecuting attorney sought, but the jury refused to make, findings of an aggravating circumstance. Petitioner greatly regrets the inconvenience to the Court and to opposing counsel caused by this error.

Unfortunately, while the AOPC will respond to inquiries from the public, it does not allow the public direct access to either its computer or its underlying data. Thus, petitioner, whose counsel did not know the precise way in which the AOPC compiles data, was not in a position to ask for the retrieval of information generated by particular entries on AOPC's forms. What petitioner requested was all instances in which the jury imposed a life sentence notwithstanding its determination that there was at least one aggravating and no mitigating circumstance present. That request produced the AOPC's response entitled "life only, 1 aggravating and 0 mitigating," which counsel reported in due course to the Court. Regardless of whether petitioner's request was confusingly worded or simply misunderstood by AOPC personnel, petitioner's counsel again apologizes for the time that Respondent and the Court have spent with the data.

The issue of jury nullification, however, remains. Indeed, Respondent's own Lodging proves the existence of that problem, which is characteristic of overly rigid capital sentencing schemes. The Pennsylvania scheme purports inflexibly to require a sentence of death whenever the jury finds the existence of one aggravating circumstance and no mitigating circumstance. From Respondent's Lodging, it is obvious that some juries, in order to avoid this mechanical straightjacket, simply refuse to make a finding of aggravation notwithstanding its indisputable presence.

That a refusal to find aggravating circumstances in the face of clear evidence is occurring in at least some of these cases is

suggested by the preponderance of Pennsylvania's felony-murder aggravating circumstance⁹ as the one presented to the jury at the sentencing hearing but which it refuses to find. (Seventeen of thirty-six cases in Respondent's Lodging fit this pattern). It is unlikely that in most cases there could be any factual dispute about this aggravating circumstance that would not have been resolved at the trial on guilt and innocence.

Unfortunately, however, the only way to show that any particular jury did in fact decline to find an aggravating circumstance despite clear evidence of the circumstance would be by examining the notes of testimony in the record of each case. Petitioner has been able to locate the notes of testimony in only a few of the cases included in Respondent's Lodging. In two of these, the evidence of the existence of the aggravating circumstance was incontrovertible, and the jury's refusal to find it—as Respondent reports (Resp. Br. 37)—could only reflect the "arbitrary and capricious exercise of . . . power" that *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976), teaches us to expect from a statute which makes "jurors' power to avoid the death penalty dependent on their willingness to . . . disregard the trial judge's instructions," *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976).

According to the AOPC Review Form supplied by Respondent at 80L-82L concerning the trial and sentence of Richard Mitchum, the prosecutor sought the death sentence based on the aggravating circumstance that the "victim was another public servant killed in performance of duty" (at 81L). Indeed Mitchum shot and killed a Philadelphia Housing Authority security guard who was at the time both on duty and in uniform (vol. IX, p. 15, at 3 PL).¹⁰ Thereafter Mitchum fled with the

⁹ 42 Pa. C.S. § 9711(d)(6): "The defendant committed a killing while in the perpetration of a felony."

¹⁰ All citations are to case records which are bound separately and lodged in this Court along with Petitioner's Reply Brief and shall be designated "PL".

guard's pistol (vol. IX, p. 16, at 4 PL). At the sentencing stage, defense counsel offered no evidence in mitigation but asked the jurors to give his client mercy (vol. XIII, p. 28, at 35-36 PL). Even though the AOPC Review Form specifies only a sole aggravating circumstance, in fact the district attorney urged the jury to impose death on the following grounds: (1) that the victim had been "a peace officer who was killed in the performance of his duties" (vol. XIII, p. 33, at 40-41 PL); (2) that the killing occurred in the course of a robbery (vol. XIII, p. 34, at 41 PL); (3) that the defendant placed other people at risk by his conduct (*Ibid.*); and (4) that the defendant had a significant history of prior criminal conduct (vol. XIII, p. 25, at 42 PL).

The jury returned a life sentence. Putting aside the evidence concerning the last three aggravating circumstances urged by the prosecutor, the evidence concerning the victim's peace officer status at the time of his murder was both incontrovertible and uncontroverted. Yet the jury, presented with no evidence in mitigation, refused to return a death sentence as required by the Pennsylvania statute.

Again, according to Respondent's Lodging, the district attorney in Nathan Long's case (61L-63L) sought a death sentence on the ground that the "victim was a peace officer killed in the performance of duty." (at 62L.) There was no doubt and no dispute about the status of Long's victim. Indeed at Long's arraignment, which occurred on July 3, 1986, the Commonwealth stated for the record that there had been a stipulation "that the deceased in this case was one police officer Daniel Gleason, at the time of his death, a thirty-eight year old white male assigned to the 25th Police District" (p. 3, at 58 PL).

Apparently on June 5, 1986, Long undertook to rid his neighborhood of the prostitute trade. Having first threatened two prostitutes with bodily harm, he went on to batter the car of an individual who was in the process, Long believed, of picking up a prostitute. Officer Gleason and his partner, Officer Venable, responded to a request for assistance as a result of Long's actions. Officer Gleason approached Long, who shot the

officer at point blank range. Notwithstanding Long's testimony that he shot in self-defense, the jury returned guilty verdicts on the following charges: possessing an instrument of crime, carrying a firearm without a license, and murder in the first degree. It did so after a closing argument by the district attorney that Officer Gleason "was a target because he stood for one thing: he stood for authority" (p. 608, at 114 PL).

At the sentencing stage, the district attorney offered evidence of Gleason's officer status through the testimony of his superior officers (p. 668, at 135 PL), as well as requesting that the testimony of the witnesses who were close to the shooting be incorporated at the sentencing phase (p. 673, at 140 PL). Defense counsel submitted no further evidence at this stage. He did, however, argue that the jury should consider his client's relatively crime free history.

The Court, in charging the jury, stated:

the Crime Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

Also, for the purpose of this case, the Commonwealth has relied on the aggravating circumstance that the victim was a peace officer or public servant concerned in official detention who was killed in the performance of his duties.

(pp. 696-97, at 163-64 PL.) Shortly thereafter one of the jurors asked the judge to define what was meant by the defendant acting under the influence of extreme mental or emotional disturbance. (p. 701, at 168 PL.) The judge responded that the statute gave no definition. (p. 702, at 169 PL.) Subsequently, the jury foreman informed the court, "We are hopefully [sic] deadlocked and we cannot come to a unanimous decision" (p. 705, at 172 PL). At this point the court imposed a life sentence. Given the clarity of the evidence concerning the victim's status,

it is hard to understand the jury's deadlock as anything but a refusal on the part of some jurors to comply with the dictates of the statutory instructions.

Clearly, if in *Mitchum* and *Long* the aggravating circumstance was not "proven" (Respondent's Lodging at ii), this was only because the sentencing jury expressed its sense of the inappropriateness of the death penalty despite an absence of mitigating circumstances by refusing to make the evidentially required finding of aggravation. *Mitchum* and *Long* exemplify the phenomenon that petitioner described in his opening brief, that if a rigid sentencing structure does not allow juries to express their reasoned moral judgment as to the appropriate sentence, some juries will flout their instructions.

Petitioner cannot assert how many of the thirty-six cases in Respondent's Lodging represent such jury nullification. Counsel for petitioner has not been able to obtain the notes of testimony in most of these cases. Perhaps there are some cases in which there was a good faith dispute about the aggravating circumstance. That this could be true in most cases—particularly felony-murder cases—seems unlikely, however.

It is also possible that the AOPC form upon which Respondent relies in its Lodging is incorrect in reporting "no aggravating circumstance proven" (Lodging at i-iii). Given the structure of the Pennsylvania verdict form, a copy of which is provided by Respondent at 73L, it is often not possible to determine the basis for a life sentence. The jurors are first asked to render their sentence, and only if the jury imposes death is it required to answer questions concerning aggravation and mitigation. Jurors who decide to spare the life of the defendant need not place their view of the evidence on the record. There is thus "no way . . . for the judiciary to check [a jury's] arbitrary and capricious exercise of . . . [the nullification] power through a review of death sentence." *Woodson v. North Carolina*, *supra*, 428 U.S. at 303.

E. All Of The Restrictions In The Statutory Instructions Operate To Prevent The Sentencing Jury From Expressing Its Reasoned Moral Response To The Evidence In Determining The Appropriateness Of A Death Sentence

Respondent complains at various points that petitioner "attempts to snift ground away from" the question upon which this Court granted certiorari. (Resp. Br. 14; see also *id.* at 20-21 n. 7 and 24-25, n. 10). That is not so. The question presented by the petition for certiorari was and remains whether "the mandatory nature of the Pennsylvania Death Penalty statute . . . improperly limits the full discretion the sentencer must have in deciding the appropriate penalty." Petition, p. 2.

None of the arguments in petitioner's brief have strayed from this question. The instructions challenged by petitioner were required by the Pennsylvania Statute and tracked its language precisely. Respondent does not argue otherwise.¹¹ Petitioner has shown that the statutory instructions prevent a Pennsyl-

¹¹ Respondent also suggests that the question presented to this Court was limited to a facial challenge to the Pennsylvania statute. (Resp. Br. 24, n. 10). Actually, the question presented was phrased in the disjunctive so as to apply as well to petitioner's particular case. In any event, the distinction between an as-applied challenge and a facial challenge is not important in the context of this case. Petitioner challenges statutory provisions that instruct the jury how to decide the sentencing issue. Those statutory provisions were read to his jury, and both petitioner and Respondent agree that the jury instructions "were in complete accord with the statute." (Resp. Br. 21). The Pennsylvania Supreme Court has not approved any instructions to a sentencing jury that go beyond the terms of the statute except in contexts not relevant to this case. See, e.g., *Commonwealth v. Crawley*, 514 Pa. 539, 526 A.2d 334 (1987) (instruction defining the word "torture" required); *Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986), *cert. denied* 109 S.Ct. 187 (1988) (approving an instruction limiting the "age of the defendant" enumerated mitigating circumstance to "youth or advanced age").

vania sentencing jury from evaluating the sufficiency of aggravating circumstances to make a death sentence appropriate in cases in which no mitigating circumstances are found. Petitioner has shown that the statutory instructions defining mitigating and aggravating circumstances prevent the sentencing jury from considering mitigating evidence that is relevant to, but insufficient to prove, the specified mitigating circumstances. The "must" language in the statute enforces these restrictions. Indeed, even Respondent says that the point of the "must" instruction is to

encourage[] the jury to determine any mitigating circumstances, and weigh them against any aggravating circumstances, most carefully.

(Resp. Br. 20)

Essentially, Pennsylvania has erected a rigid capital sentencing structure that precludes its juries from lawfully making "a reasonable moral response to the defendant's background, character and crime" *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion)). Pennsylvania includes among its aggravating circumstances situations in which defendant's moral culpability varies widely—such as murder "in the perpetration of a felony"—but does not allow the jury to assess the extent of the aggravation in the particular case unless an enumerated mitigating circumstance is found. The seven specific enumerated mitigating circumstances in turn are limited so as to exclude plainly relevant mitigating evidence; and the "catch-all" eighth mitigating circumstance permits consideration only of "other" mitigating evidence—a restriction that a reasonable juror would understand to exclude mitigation which is barred by the explicit limitations of the preceding seven mitigating circumstances. All of these limitations are enforced by an instruction that the sentence *must* be death if one aggravating circumstance and no mitigating circumstance is found. Thus, ineluctably, a jury may be driven to sentence a defendant to death despite doubts about the appro-

priateness of the sentence that it is unable to express through the structures of this mechanistic process.

Respectfully submitted,

PAUL R. GETILEMAN

Counsel of Record

R.D. 1, Box 325

Zelienople, PA 16063

(412) 521-0500

BRUCE S. LEDEWITZ

School of Law, Hanley Hall

Duquesne University

900 Locust Street

Pittsburgh, PA 15282

(412) 434-5011

STEFAN PRESSER

125 S. 9th Street, Suite 701

Philadelphia, PA 19107

(215) 592-1513

Counsel for Petitioner

FILED

JUL 24 1989

JOSEPH F. SPANIOLO, JR.
CLERK

(9)
No. 88-6222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

SCOTT WAYNE BLYSTONE, Petitioner,
vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of the Commonwealth of Pennsylvania

BRIEF AMICI CURIAE

State of California, joined by the
States of Arizona, Connecticut, Idaho, Illinois,
Indiana, Montana, New Hampshire, Nevada, North
Carolina, South Carolina, Tennessee, Utah, Wyoming

JOHN K. VAN DE KAMP
Attorney General
of the State of California
RICHARD B. IGLEHART
Chief Asst. Attorney General
ARNOLD O. OVEROYE
Senior Asst. Attorney General
EDMUND D. McMURRAY
DANE R. GILLETTE
Deputy Attorneys General
WARD A. CAMPBELL
Deputy Attorney General
[Attorney of Record]
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5251

446P

ROBERT K. CORBIN
Attorney General of Arizona
JOHN J. KELLY
Connecticut Chief State's Attorney
JAMES T. JONES
Attorney General of Idaho
NEIL F. HARTIGAN
Attorney General of Illinois
LINLEY E. PEARSON
Attorney General of Indiana
MARC RACICOT
Attorney General of Montana
JOHN P. ARNOLD
Attorney General of New Hampshire
BRIAN MCKAY
Attorney General of Nevada
LACY P. THORNBURG
Attorney General of North Carolina
T. TRAVIS MEDLOCK
Attorney General of South Carolina
MICHAEL BURSON
Attorney General of Tennessee
R. PAUL VAN DAM
Attorney General of Utah
JOSEPH P. MEYER
Attorney General of Wyoming

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
THE PENNSYLVANIA DEATH PENALTY STATUTE PROPERLY REQUIRES THAT THE DEATH PENALTY BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES SINCE THE STATUTE ALSO PROVIDES FOR THE NARROWING OF THE CLASS OF DEATH PENALTY-ELIGIBLE OFFENDERS AND PERMITS CONSIDERATION OF ALL MITIGATING EVIDENCE	9
CONCLUSION	37

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Adamson v. Ricketts</i> , 865 F.2d 1011 (9th Cir. 1988)	6,10,21
<i>Barclay v. Florida</i> , 463 U.S. 939, 961-962 (1983)	26,30,31
<i>Bonin v. California</i> , cert. den., ___ U.S. ___, 57 U.S.L.W. 3619	3
<i>California v. Brown</i> , 479 U.S. 538 (1987)	14,16,17,19
<i>California v. Ramos</i> , 463 U.S. 992 (1983)	34
<i>Campbell v. Kincheloe</i> , 829 F.2d 1453, 1466 (9th Cir. 1987)	27
<i>Commonwealth v. Blystone</i> , 549 A.2d 81, 92 (Pa. 1988)	9
<i>Commonwealth v. Cross</i> , 496 A.2d 1144, 1151 (Pa. 1985)	13
<i>Commonwealth v. Maxwell</i> , 447 A.2d 1309, 1317-1318 (Pa. 1984)	9
<i>Commonwealth v. Peterkin</i> , 513 A.2d 3673, 387-388 (Pa. 1986)	13
<i>Cooper v. State</i> , 336 S.2d 1133, 1142 (Fla. 1976)	30
<i>Franklin v. Lynaugh</i> , ___ U.S. ___, 108 S.Ct. 2320	passim

TABLE OF AUTHORITIES

Con't

<u>CASES</u>	<u>Page</u>
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	passim
<i>Grandison v. State</i> , 305 Md. 685, 506 A.2d 580, 616 (Md. 1986)	25
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	passim
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976)	passim
<i>Lowenfield v. Phelps</i> , ___ U.S. ___, 108 S.Ct. 546, 555 (1988)	12
<i>McCleskey v. Kemp</i> , 481 U.S. 279, 305 (1987)	14
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	14
<i>McKenzie v. Risley</i> , 842 F.2d 1525, 1543 (9th Cir. 1988)	28
<i>Penry v. Lynaugh</i> , ___ U.S. ___, 57 U.S.L.W. 4958 (1989)	11,19,33
<i>People v. Adcox</i> , 47 Cal.3d 207, 270-271; 253 Cal.Rptr. 55; 763 P.2d 906 (Cal. 1988)	11

TABLE OF AUTHORITIES

Con't

CASES

<i>People v. Ghent</i> , 43 Cal.3d 739, 776; 239 Cal.Rptr. 82; 739 P.2d 1250 (Cal. 1987)	11
<i>People v. Hendricks</i> , 44 Cal.3d 635, 654; 244 Cal.Rptr. 181; 749 P.2d 836 (Cal. 1988)	23
<i>People v. Montgomery</i> , 122 Ill. 517, 98 Ill.Dec. 353, 494 N.E.2d 475, 482 (Ill. 1986)	24
<i>People v. Tichnell</i> , 306 Md. 428, 509 A.2d 1179, 1199 (Md. 1986)	25
<i>Pulley v. Harris</i> , 465 U.S. 45	36
<i>Proffitt v. Florida</i> , 428 U.S. 242 (1976)	1, 2, 16, 30
<i>Roberts v. Louisiana</i> , 428 U.S. 325, 362 fn. 8 (1976)	30, 32
<i>State v. Beaty</i> , 158 Ariz. 232, 762 P.2d 519, 533-534 (Ariz. 1988)	10, 21
<i>State v. Dicks</i> , 615 S.W.2d 126, 131 (Tenn. 1981)	26
<i>State v. Gretzler</i> , 135 Ariz. 42, 659 P.2d 1, 13-14 (1983)	10, 21

TABLE OF AUTHORITIES

Con't

CASES

<i>State v. Jeffries</i> , 105 Wash.2d 398, 717 P.2d 722, 737 (Wash. 1986)	27
<i>State v. Jenkins</i> , 15 Ohio St. 164, 473 N.E.2d 264, 280-281 (Ohio 1984)	26
<i>State v. Price</i> , 195 N.J.Super 285, 478 A.2d 1249, 1254-1255 (N.J. Super L. 1984)	23
<i>State v. Ramseur</i> , 106 N.J. 123, 524 A.2d 188, 287 fn.81 (N.J. 1987)	24
<i>Turner v. Murray</i> , 476 U.S. 28 (1986)	34
<i>Williams v. State</i> , 386 S.2d 538, 543 (Fla. 1980)	31
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	passim
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	29, 34

CONSTITUTIONAL PROVISIONS

42 Pa. Cons. Stat. § 9711	9
42 Pa. Cons. Stat. § 9711(c)(iv)	10
Eighth Amendment	passim

QUESTION PRESENTED

May a death penalty statute, which narrows the class of death penalty-eligible offenders and which provides for individualized consideration of all mitigating evidence proffered by an offender including evidence of the circumstances of the offense, guide and channel sentencer discretion by requiring that the death penalty be imposed if the aggravating circumstances outweigh the mitigating circumstances?

INTEREST OF AMICI CURIAE

Amici curiae are states which adopted death penalty statutes in response to this Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). Those cases held that the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution requires that death penalty statutes suitably direct and limit the discretion of sentencers in death penalty cases in order "to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra*, at 189.) Pursuant to these decisions, we enacted capital punishment laws which narrowed the class of death-penalty

eligible offenders and which provided that our sentencers should consider all mitigating evidence as part of their individualized consideration of the defendants' crime and circumstances.

Having met our Eighth Amendment obligations, we relied on this Court's decisions to adopt various procedures for channeling and guiding sentencer discretion in determining penalty. These procedures included permitting "unbridled discretion" (*Gregg v. Georgia, supra*); "weighing" of aggravating and mitigating circumstances (*Proffitt v. Florida, supra*); and responding to specific questions about the defendant (*Jurek v. Texas, supra*). Yet, our statutes have been challenged because they channel and guide the exercise of sentencer discretion. (See,

e.g., *Hamilton v. California*, cert. den., __U.S.__, 109 S.Ct. 879, 880-882 (Marshall, J. dis.); *Bonin v. California*, cert. den., __U.S.__, 57 U.S.L.W. 3619 (Brennan, Marshall, J.J. dis.).)

In this case, petitioner is attacking Pennsylvania's death penalty statute which requires imposition of the death penalty if aggravating circumstances outweigh mitigating circumstances. He argues that this statute creates an unconstitutional so-called "mandatory" death penalty which

1. This Court has since granted the petition for writ of certiorari in *Boyde v. California* (No. 88-6613) which presents the question of whether it violates the Eighth and Fourteenth Amendments to instruct a jury that it "shall" impose a death sentence if the aggravating outweighs the mitigating in light of arguably misleading prosecutorial argument.

compels the sentencer to impose that punishment even if the sentencer believes that the punishment is inappropriate. We believe that petitioner's argument erroneously creates a third requirement -- death penalty laws -- "unbridled discretion" for the sentencer in the final determination of penalty. Petitioner's argument is contradicted by the precedents of this Court which we relied upon in drafting our death penalty statutes. We believe that if this argument is adopted, it will provide authority for further federal review of other state statutes that guide and channel sentencer discretion in order to minimize arbitrary and capricious action.

Indeed, this argument is yet another example of how an isolated phrase or limited portion of this Court's prior opinions concerning other states' statutes can be taken out of context and distorted into an attack on other dissimilar statutes. In this case, petitioner is misusing this Court's line of cases beginning with *Woodson v. North Carolina*, 428 U.S. 280 (1976) to argue that a mandatory death penalty is unconstitutional even when the statutory scheme provides for full consideration of all mitigating circumstances. Accepting petitioner's argument will endanger many statutes that were adopted in good faith reliance on this Court's assurance that there is no "right way for a State to set up its

capital sentencing scheme." (*Spasiano v. Florida*, 468 U.S. 447, 464 (1984).)

SUMMARY OF ARGUMENT

Pennsylvania's death penalty statute requires the sentencer to impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating circumstances. Petitioner argues that this provision of Pennsylvania's law constitutes an unconstitutional so-called "mandatory" death penalty which allegedly deprives murderers of an individualized consideration of their offenses and circumstances.

Amici curiae submit that petitioner's argument mistakenly extends this Court's decisions on capital punishment. This Court has held that the Eighth Amendment requires that a

death penalty statute narrow the class of death-penalty eligible offenders and that the sentencer make an individualized determination of the proper sentence by considering all mitigating evidence. However, contrary to petitioner's argument, this Court's cases do not require that the sentencer have "unbridled discretion" in finally determining the appropriate penalty. Petitioner's position, by requiring "unbridled discretion," improperly intrudes into Pennsylvania's scheme for channeling and guiding sentencer discretion that is part of Pennsylvania's "effort to achieve a more rational and equitable administration of the death penalty." (*Franklin v. Lynaugh*, __U.S.__, 108 S.Ct. 2320, 2331 (1988) (White, J. plur.).)

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. "[E]ach distinct system must be examined on an individual basis." (*Gregg v. Georgia, supra*, 428 U.S. at 195.) Amici urge this Court to uphold Pennsylvania's statute and the instructions given in petitioner's case not because they are constitutionally compelled, but solely because they are not constitutionally prohibited.

ARGUMENT

THE PENNSYLVANIA DEATH PENALTY STATUTE PROPERLY REQUIRES THAT THE DEATH PENALTY BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES SINCE THE STATUTE ALSO PROVIDES FOR THE NARROWING OF THE CLASS OF DEATH PENALTY-ELIGIBLE OFFENDERS AND PERMITS CONSIDERATION OF ALL MITIGATING EVIDENCE

Pennsylvania's death penalty statute narrows the class of death penalty eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. (42 Pa. Cons. Stat. § 9711; *Commonwealth v. Blystone*, 549 A.2d 81, 92 (Pa. 1988); see *Commonwealth v. Maxwell*, 447 A.2d 1309, 1317-1318 (Pa. 1984).)

Pennsylvania's law requires the jury to impose the death sentence if it finds the existence of one statutory aggravating factor and no mitigating factors or if it finds that the

aggravating factors outweigh the mitigating factors. (42 Pa. Cons. Stat. § 9711(c)(iv).) Petitioner argues that this provision of the Pennsylvania law is unconstitutional because it creates a supposed "mandatory death penalty" that precludes individualized sentencing based on the circumstances of the offense and the offender.

Amici curiae submit that this argument is an unwarranted extension of this Court's jurisprudence. We contend that once a state establishes a rational scheme for the discretionary consideration of aggravating and mitigating factors, that further federal review is unnecessary. However, petitioner's argument would engraft a

third requirement of "unbridled discretion" for sentencers.^{2/}

2. In his brief on the merits, petitioner has departed from the question presented and has changed the focus of his attack from challenging the facial validity of Pennsylvania's statute to challenging the instructions based on Pennsylvania's statutory language which were given in his case. (See, e.g. *Penry v. Lynaugh*, ___ U.S. ___, 57 U.S.L.W. 4958 (1989).) This brief concerns itself with the facial validity attack first raised in the petition for writ of certiorari. Pennsylvania's brief deals with the attack on the instructions. Amici note that the Pennsylvania Supreme Court opinion affirming petitioner's death judgment does not indicate that petitioner challenged the instructions given in his case. Amici further note that to the extent that petitioner challenges the instructions on mitigating circumstances as incomplete because of the inclusion of qualitative modifiers to some of the mitigating factors (i.e. "extreme" mental disturbance, "substantial" domination etc.), that this argument has been rejected in other courts. (See, e.g. *People v. Ghent*, 43 Cal.3d 739, 776; 239 Cal.Rptr. 82; 739 P.2d 1250 (Cal. 1987); *People v. Adcox*, 47 Cal.3d 207, 270-271; 253 Cal.Rptr. 55; 763 P.2d 906 (Cal. 1988).)

As recently as 1988, this Court held that the Constitution "requires no more" than that death penalty statutes "narrow[] the class of death-eligible murderers and then at the sentencing phase allow[] for the consideration of mitigating circumstances and the exercise of discretion." (*Lowenfield v. Phelps*, ___U.S.___, 108 S.Ct. 546, 555 (1988).) However, this Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled. "Much in our cases suggests just the opposite." (*Franklin v. Lynaugh*, ___U.S.___, 108 S.Ct. 2320, 2331 (1988) (White, J. plur.).)

Initially, amici note that the Pennsylvania statute is not the type of "mandatory" statute first condemned by this Court in *Woodson v. North Carolina*, *supra*. Unlike the "mandatory" statutes invalidated by this Court, Pennsylvania's statute permits consideration of all mitigating evidence. (*Commonwealth v. Cross*, 496 A.2d 1144, 1151 (Pa. 1985).) Furthermore, unlike the true "mandatory" statutes this Court denounced in *Woodson*, Pennsylvania's law is consistent with the Eighth Amendment requirement that the death penalty be imposed in a rational and non-arbitrary fashion. (*Commonwealth v. Peterkin*, 513 A.2d 3673, 387-388 (Pa. 1986).)

Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), capital sentencers

had unbridled discretion in determining penalty. (*McGautha v. California*, 402 U.S. 183 (1971).) However, in *Furman*, this Court declared such total discretion unconstitutional because it lead to irrational and arbitrary results. (*Gregg v. Georgia*, 428 U.S. 153, 188 (1976) citing *Furman v. Georgia*, *supra*.) Since *Furman*, this court has "identified a constitutionally permissible range of discretion in imposing the death penalty." (*McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).) That permissible range falls between "a required threshold below which the death penalty cannot be imposed" and the requirement that the sentencer consider all mitigating evidence. (*Id.* at 305-306; see also *California v. Brown*, 479 U.S. 538, 541 (1987).)

This Court has merely indicated that it will tolerate "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death-penalty eligibility and has considered all mitigating evidence. "[T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. 2331) (White J. plur.).)

It is understandable why states choose to canalize the discretion

of sentencers in considering the circumstances and determining the final penalty. This Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created "a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." (*Gregg v. Georgia, supra*, 428 U.S. at 188 citing *Furman v. Georgia, supra*.) Channeling a sentencer's discretion can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. (See *California v. Brown, supra*, 479 U.S. at 543.) Furthermore, states can ensure that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (*Proffitt v. Florida*, 428 U.S. 242, 260 (1976))

(White, J. conc.); *Jurek v. Texas*, 428 U.S. 262, 278-279 (1976) (White, J. conc.).) The channeling of sentencer discretion can "minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra*, at 189.) Such schemes promote the rational and predictable administration of death penalty laws. (*California v. Brown, supra*, 479 U.S. at 541.) Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia, supra*, 408 U.S. at 238 (White, J. conc.).) They also foster reliability and further judicial review. (*California v. Brown, supra*, 479 U.S. at 543.)

These schemes do not sacrifice the requirement that death sentencing be individualized because they do not preclude the admission and consideration of any relevant mitigating evidence. As a "practical matter" sentencers will be aware of the consequences of their weighing of the aggravating and mitigating. (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331 fn. 12 (White, J. plur.)) The "weighing" process does not eliminate subjectivity, but it does set "clear and objective" standards to minimize discrimination. (*Gregg v. Georgia*, *supra*, 428 U.S. at 189, 198.)

Finally, these "weighing" statutes resolve any "tension" that may exist between the Eighth Amendment requirements that the death penalty be imposed in a rational manner and that

the sentencer consider all potential mitigating evidence. (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331 (White, J., plur.) citing *California v. Brown*, *supra*, 479 U.S. at 544 (O'Connor, J., conc.)) Since these statutes do not preclude consideration of any mitigating evidence, they protect the Eighth Amendment interest in ensuring that the death penalty is "appropriate" in a particular case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at 305 (Stewart, J., plur.) Yet, by requiring that the death penalty then be imposed if the aggravating circumstances outweigh mitigating circumstances, these statutes also promote the Eighth Amendment requirement that the capital sentencing decision be a "reasoned moral response" to the evidence. (*Penry v.*

Lynaugh, __U.S.__, 57 U.S.L.W. 4958, 4965 (1989).)

Taking their cue from this Court, many states have chosen to follow the approach of channeling and guiding the sentencer's consideration of aggravating and mitigating circumstances.^{3/} For instance, Arizona law requires imposition of the death penalty if the sentencer finds one aggravating factor and no mitigating factors substantial enough to call for leniency. The Arizona courts have interpreted this formula as requiring the imposition of the death sentence if aggravating circumstances qualitatively outweigh mitigating circumstances.

3. A complete list of all state statutes with statutory schemes similar to Pennsylvania's is set forth in Pennsylvania's brief on the merits.

(*State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13-14 (Ariz. 1983).) This requirement means that "a defendant will stand the same chance of receiving the death penalty from a judge [the Arizona sentencer] who does not philosophically believe in the death penalty as from a judge who does." (*State v. Beaty*, 158 Ariz. 519, 762 P.2d 19, 534 (Ariz. 1988).) Thus, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first degree murders, as the legislature intended." (*Ibid.*)^{4/}

4. The Arizona death penalty formula was declared unconstitutional by the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). Arizona's petition for writ of certiorari is currently pending before this Court in *Ricketts v. Adamson*, (No. 88-1553).

California requires that the death penalty "shall" be imposed if aggravating circumstances outweigh mitigating circumstances. These circumstances are based on the evidence presented in the guilt and penalty phases. The determination is not a mechanistic or numerical process. (*People v. Brown*, 40 Cal.3d 512, 541; 220 Cal.Rptr. 637, 709 P.2d 440 (Cal. 1985).) However, the determination of appropriateness is inherent in the "weighing" process. To instruct penalty phase jurors that they may ignore the outcome of the "weighing process" "comes perilously close to violating the mandate of [*Furman*] that the jurors must be given specified standards or guidelines within which to focus their discretion . . . [and] would invite

arbitrary decisions based on improper or irrelevant sentencing considerations . . ."
 . . . (*People v. Hendricks*, 44 Cal.3d 635, 654; 244 Cal.Rptr. 181; 749 P.2d 836 (Cal. 1988).)^{2/}

Similarly, New Jersey mandates a death penalty if the aggravating factors outweigh mitigating factors. However, such a law is "hardly the automatic imposition of death found unconstitutional in [*Woodson*]. . . ." since New Jersey law permits consideration of all mitigating factors. (*State v. Price*, 195 N.J. Super 285, 478 A.2d 1249, 1254-1255 (N.J. Super L. 1984).) The New Jersey courts have

5. For instance, jurors would not be able to consider residual or lingering doubt about guilt as a mitigating factor. (*Franklin v. Lynaugh, supra*, 108 S.Ct. at 2326-2328, 2334-2335 (O'Connor, J. conc.).)

noted that this Court has never required a so-called "mercy" provision. (*Ibid.*)

New Jersey has rejected the argument that a jury should also decide explicitly that death is the "appropriate" penalty since the vagueness of that term would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious."

(*State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 287 fn.81 (N.J. 1987).)

Illinois requires imposition of the death penalty if there are no mitigating factors sufficient to preclude that punishment. This finding "is synonymous with a finding that death is the appropriate penalty." (*People v.*

Montgomery, 122 Ill. 517, 98 Ill.Dec. 353, 494 N.E.2d 475, 482 (Ill. 1986).)

Maryland courts have also rejected the argument that juries should be instructed that they may impose a life sentence without regard to the relative weights of aggravating and mitigating factors. Otherwise, "there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not." (*People v. Tichnell*, 306 Md. 428, 509 A.2d 1179, 1199 (Md. 1986).) Such an instruction would permit "unguided discretion." (*Grandison v. State*, 305 Md. 685, 506 A.2d 580, 616 (Md. 1986).)

Ohio requires the jury to recommend the death penalty to the court if aggravating factors outweigh

mitigating factors beyond a reasonable doubt. Since Ohio law permits the introduction of any relevant mitigating factors, Ohio courts have found that this system comports with the Eighth Amendment. (*State v. Jenkins*, 15 Ohio St. 164, 473 N.E.2d 264, 280-281. (Ohio 1984) discussing *Barclay v. Florida*, *supra*, 463 U.S. at 958 (Stevens, J.J. conc.).)

Tennessee has upheld its analogous death penalty law since its statute requires the sentencer to consider all mitigating factors. (*State v. Dicks*, 615 S.W.2d 126, 131 (Tenn. 1981).)

Finally, the State of Washington requires that the death penalty be imposed if "there are not sufficient mitigating circumstances to

merit leniency. . . ." (*State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722, 737 (Wash. 1986).) Washington has rejected the argument that this statute imposes a "mandatory" death penalty in violation of *Woodson*, since the statute allows for jury discretion in considering all mitigating factors. However, once the jury has exercised that discretion, "[i]t is only at this point that the death penalty becomes mandatory. . . . The result is that the penalty of death is not arbitrarily or capriciously imposed, but instead is imposed in a just manner." (*Id.* at 737-738; see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987).)

Montana's law is similar to Washington's in requiring a death penalty if there are no mitigating

circumstances sufficiently substantial to call for leniency. (*People v. Coleman*, 605 P.2d 1000, 1016.) However, Montana has held that such a scheme is not an unconstitutional mandatory statute since Montana's statute requires its sentencers to consider all facts existing in mitigation. (*Id.* at 1017; see also *McKenzie v. Risley*, 842 F.2d 1525, 1543 (9th Cir. 1988).)

These states have chosen, along with Pennsylvania, to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages these states' choice of action.

In *Gregg v. Georgia*, *supra*, this Court rejected the argument that the Georgia statute was unconstitutional because it permitted a jury to decline to impose the death penalty even when aggravating circumstances were present by merely stating that such discretion did not violate the Constitution. (*Id.* at 199, 203.) In *Zant v. Stephens*, 462 U.S. 862 (1983), this Court rejected a renewed challenge to Georgia's "unbridled discretion" by simply noting that the Constitution did not require specific standards for the jury's consideration of aggravating and mitigating circumstances. (*Id.* at 875, 876 fn. 13, 880, 890.)

Obviously, *Gregg* did not prohibit states from channeling discretion if the states thought it

necessary and desirable. In *Proffitt v. Florida, supra*, this Court approved a statute, like Pennsylvania's, that required imposition of the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Florida interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. (*Barclay v. Florida*, 463 U.S. 939, 961-962 (1983) citing *Cooper v. State*, 336 S.2d 1133, 1142 (Fla. 1976) (Stevens, J. conc.); see also *Woodson v. North Carolina*, 428 U.S. 280, 315 (1976) (Rehnquist, J. dis.); *Roberts v. Louisiana*, 428 U.S. 325, 362 fn. 8 (1976) (White, J. dis.).) The concurrence in *Proffitt* praised the Florida statute because it "required" the sentencer to impose the death

penalty if aggravating outweighed mitigating. (*Proffitt v. Florida, supra*, 428 U.S. at 260-261 (White, J. conc.).) When this Court again approved Florida's statute in *Barclay v. Florida, supra*, that state still interpreted its statute as establishing a rebuttable "presumption" of death. (*Barclay v. Florida, supra*, 463 U.S. at 961-962 citing *Williams v. State*, 386 S.2d 538, 543 (Fla. 1980) (Stevens, J. conc.).)

Notably, this Court also approved the Texas death penalty scheme. (*Jurek v. Texas*, 428 U.S. 262 (1976).) That statute required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death-penalty

eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. (*Id.* at 270-276 (*Stewart, J. plur.*)). The concurrence in *Jurek* noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." (*Id.* at 279 (*White, J. conc.*)); see also *Woodson v. North Carolina, supra*, 428 U.S. at 315 (*Rehnquist, J. dis.*); *Roberts v. Louisiana, supra*, 428 U.S. at 359 (*White, J. conc.*)). *Franklin v. Lynaugh, supra*, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. (*Franklin v.*

Lynaugh, supra, 108 S.Ct. at 2330-2332 (*White, J. plur.*), 2333 (*O'Connor, J. conc.*)). ^{4/}

6. This Court's recent opinion in *Penry v. Lynaugh*, __U.S.__, 57 U.S.L.W. 4958 does not affect this analysis. In *Penry*, this Court merely held that Texas juries must be permitted to consider and give effect to mitigating evidence without being restricted by the three "special issues" that Texas juries must answer affirmatively to impose the death penalty. *Penry* is no more than an extension of the line of cases beginning with *Jurek v. Texas, supra*, and *Woodson v. North Carolina, supra*, that require sentencers to consider and give independent weight to all relevant mitigating evidence in order to ensure that the death penalty is "appropriate". That, of course, is an question separate from the one presented in this case--whether states may guide and channel the decision that follows the consideration of that evidence. In fact, this Court merely held "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence. . . ." (*Id.* at 4964.) Once again, this Court is merely indicating that it will tolerate such discretion. *Penry* must be analyzed in the context of the peculiar Texas statute. Its holding cannot be extended to other states, such as Pennsylvania, which already permit full consideration

This Court's other precedents also indicate, sometimes by negative implication, that "unbridled discretion" is not a constitutional requirement. In *California v. Ramos*, 463 U.S. 992 (1983), this Court reiterated that the Constitution is not violated by a scheme that permits a jury to exercise unbridled discretion in choosing a penalty once a defendant is found to be a member of the class of death-eligible offenders. (*Id.* at 1008-1009 fn. 22 citing *Zant v. Stephens*, *supra.*) In *Turner v. Murray*, 476 U.S. 28 (1986), this Court analyzed the Virginia death penalty law which allows the sentencer to reject the death penalty if there are aggravating circumstances present, but no mitigating circumstances. The

of all mitigating evidence.

plurality noted that "Virginia's death penalty statute gives the jury greater discretion than other systems which we have upheld against constitutional challenge." (*Id.* at 34 citing *Jurek v. Texas* (White, J. plur.).)

Thus, to argue that Pennsylvania's death penalty is unconstitutional, petitioner twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any canalization of sentencer discretion whatsoever. In doing so, he advocates a third federal requirement that sentencing discretion be unbridled that will preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion.

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. (*Gregg v. Georgia, supra*, 428 U.S. at 195.) Given past practice, Amici nevertheless expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing the death penalty. We urge the Court, therefore, not only to uphold Pennsylvania's statute, but to reaffirm the position it took in *Pulley v. Harris, supra*, 465 U.S. at 45: "To endorse the statute as a whole is not to say that anything different is unacceptable."

CONCLUSION

Amici curiae request this Court to affirm the judgment of the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
RICHARD B. IGLEHART
Chief Asst. Attorney General
ARNOLD O. OVEROYE
Senior Asst. Attorney General
EDMUND D. McMURRAY
DANE R. GILLETTE
Deputy Attorneys General

WARD A. CAMPBELL
Deputy Attorney General